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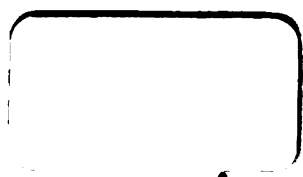
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**A TREATISE**  
**ON THE LAW OF**  
**PERSONAL PROPERTY**

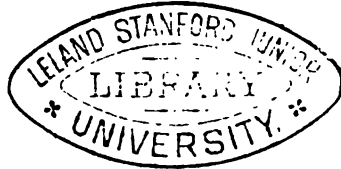
**BY**  
**JAMES SCHOUZER, LL.D.**  
**PROFESSOR IN THE BOSTON UNIVERSITY LAW SCHOOL, AND**  
**AUTHOR OF TREATISES ON "THE DOMESTIC RELATIONS," "BAILMENTS,**  
**INCLUDING CARRIERS," "EXECUTORS," AND "WILLS"**

**THIRD EDITION**

**IN TWO VOLUMES**

**VOL. I.**

**BOSTON**  
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## PREFACE TO THE THIRD EDITION.

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SINCE the preface to the first edition of this volume was composed in 1873, the author has extended the scope of his investigation into the subject of Personal Property. What is there said should be taken by the reader with corresponding allowance; and as to the author, a second revision of this work rendered it proper that various changes should be made to adapt the present volume to altered circumstances, which changes appear likewise in this third edition.

The author has personally revised this entire volume with competent clerical assistance, making suitable references to the latest English and American cases and leading textbooks on the various topics discussed. The changes are still maintained which he introduced into the second edition in order to increase the practical usefulness of the work to the utmost, without greatly enlarging its size. While the plan of this volume remains essentially as before, in describing the Nature, General Incidents, and Classification of Personal Property, it has gained in text about seventy pages over the second edition. Some six hundred new cases, too, are cited in this volume, by titles; but the printed Table affords no just criterion, for many other cases of minor importance for illustrating a principle will be found cited by book and page only.

The second volume of this work has been similarly revised by the author, and is issued at the same time in its third edition.

J. S.

September 1, 1896.



## PREFACE TO THE FIRST EDITION.

---

"OUR law-books," observes one of America's ripest professional scholars, — Mr. Bishop, — "do not, to any great extent, treat of personal property under a separate head, the same as they do of real estate. A treatise which shall do this well is really a *desideratum* in legal literature."

Chancing to read this passage some years ago, I was much impressed by its force and originality. Subsequent study served to convince me more fully that Mr. Bishop's remark was a just one; and the favor with which my former treatise on the Domestic Relations was received by the professional public induced me to seek to supply this *desideratum* by my own efforts. Such is my explanation for venturing to appear as a text-writer once more — and probably for the last time — with a work which I hope will be found to cover new ground, and to rank among the original as well as useful law-books of the day. There are treatises, and good ones too, which deal with special branches of Personal Property law; but other topics have almost utterly escaped critical attention; nor am I aware of any modern writer who has before sought to map out the law of this vast subject so as to present anything like an orderly and comprehensive sketch of principles. Mr. Williams's compact little volume on Personal Property enjoys, it is true, a well-deserved popularity; but in scope and subject-matter that work differs essentially from the present; and notwithstanding the careful annotations of American editors, it is likely to remain, what the author designed it should be, a manual for English students in conveyancing, rather than a text-book suited to the more



general wants of law-students and practising lawyers, and especially those of our own land. Chancellor Kent devotes but little space in his Commentaries to the general characteristics of chattel law ; and indeed some of its most interesting doctrines had hardly begun to unfold when his busy pen was laid aside. I need hardly add that Blackstone, living in a day when real predominated largely over personal wealth, furnishes little for our instruction. Property jurisprudence now reveals itself in two grand and independent divisions, American courts often shaping the rules and leading the way ; and there is room in the lawyer's library for a work on Personal Property, elementary in its character, to serve as the companion of our many valuable treatises on Real Estate law.

In one particular I desire to anticipate criticism. A work like this, which is made up in great part from the copious materials of some twenty volumes of the same size, deals necessarily with principles and not details ; and it would be found impossible to cite or comment upon decided cases with anything like freedom or fulness, when discussing some of the larger topics. Leading cases, properly so called, have generally been referred to ; specimen cases are chosen where the field was too vast for minute selection ; and I have taken pains to refer accurately, at all times, to such works on special topics of Personal Property as would best supply all the precedents which I had omitted. But, besides, I have freely used materials of my own gathering throughout this book, especially as concerns the latest decisions ; while in chapters on the less familiar topics, such as Joint and Common Owners, Interest and Usury, Money, and Chattel Mortgages, the compilation of cases is entirely my own.

Seeking to develope an extensive subject in a natural order of progression, I have found myself unable to treat of the "Title to Personal Property" within the present limits. A second volume, devoted to that subject, and covering especially the important topics of Gift and Sale, would be required to complete the present work according to the original plan. But whether that volume shall ever be written, is doubtful ;

nor am I unmindful that the legal profession is already supplied with good works on those topics, which may suffice for their wants. At all events this volume gathers the matter most needed, and will be found complete in itself; and such as it is, I submit the work to an indulgent professional public, in the hope that it may prove useful, and hence successful.

JAMES SCHOULER.

WASHINGTON, D. C.,  
February 21, 1873.



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# **LAW OF PERSONAL PROPERTY.**

**VOL. I.**

**1**

1

2

3

# THE LAW OF PERSONAL PROPERTY.

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## PART I.

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### INTRODUCTORY.

§ 1. **General Division of the Subject.** — It will be convenient, for the due treatment of our present comprehensive subject, to consider it under these three consecutive heads: I. NATURE AND GENERAL INCIDENTS OF PERSONAL PROPERTY; II. LEADING CLASSES OF PERSONAL PROPERTY; III. TITLE TO PERSONAL PROPERTY. The first two heads receive consideration in the present volume. The third head is reserved for a second and still later volumes; the development of the law of Title to Personal Property leading us to an extended investigation of such important topics of jurisprudence as Original Acquisition, Gift, Sale, and Bailment; not to add others which elementary writers have seen fit to include under the same general head.<sup>1</sup>

<sup>1</sup> The present author, having been gradually led on to investigate the law of personal property, after the present volume was issued in 1878, has, in the course of ten years, prepared and published three other volumes, which finally conclude his labors on this extensive subject. (1) Volume II. of *Personal Property* (or, as he would prefer to call it, *Gifts and Sales*), embracing the topics of Original Acquisition, Gift, and Sale. (2) *Bailments, including Carriers, Innkeepers, and Pledge*. (3) *The Law of Executors and Administrators*. These volumes develop the idea of Title; i. e., how personal property of various kinds may be acquired, enjoyed, and transferred.

## PART II.

### NATURE AND GENERAL INCIDENTS OF PERSONAL PROPERTY.

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#### CHAPTER I.

##### PERSONAL PROPERTY IN GENERAL.

§ 2. **Personal Property at the Common Law Defined.** — The term PERSONAL PROPERTY — using the word “property” with reference to the thing owned, and not the right of ownership — embraces at the common law all those things in which one may have a right and interest to the exclusion of others, with the exception of what we commonly designate in these days as real property or real estate.

§ 3. **Mobility the Leading Essential Quality of Personal Property.** — The leading essential quality of personal property, in all systems of jurisprudence, — that which serves more nearly than any thing else to mark the meaning and to distinguish personal from real property. — is its *mobility*. Things real, like lands, trees, and houses, have a fixed locality; they are immovable, so to speak. But things personal, such as money, jewelry, clothing, household furniture, boats, and carriages, are said to follow the person of the owner, wherever he goes; they need not be enjoyed in any particular place; and hence they are movable. This fundamental division of property into immovables and movables is the primary and most obvious one; and to each class we find that a separate set of legal principles has been universally applied. The popular appli-

cation of the terms "real" and "personal," in the English tongue, is to the same effect.<sup>1</sup>

§ 4. **Division of Things into Movables and Immovables; Changes from the one Kind to the other by Severance or Incorporation with Soil.**— And here we may observe how frequently things which were originally immovable become, through the operations of nature, or by the art of man, movable, so as to change from real to personal property; and, on the other hand, how things once movable, or personal property, acquire the characteristics and become subject to the law of real property. Thus, a tree is real property so long as it stands in its native soil; but cut that tree down and make a pile of wood, and you may subject it to the laws of personal property; use that wood in making a chair or a table, or deposit it in your neighbor's cellar for fuel, and it is unquestionably personal property. A mineral or metal in the earth is real property; but dig out the precious substance, and you have an article of merchandise, which is personal property. There is the orchard with its hanging fruit; and here is the gathered fruit ready for sale in the market. The act of complete severance, then, is commonly what changes property from real to personal, from immovable to movable; although the thing itself which we carry from place to place may not be the result of a mere severance, like fruits, vegetables, hewn trees, and coal, but the result of a severance followed by other acts of workmanship, as in the case of money wrought up from gold and silver ore, furniture from trees, and necklaces from precious stones once imbedded in the ground.

Personal property may be changed into real property, likewise; as in the very common instance where one takes building stone, bricks, and mortar, — all personal property, — and fashions them into a house, which becomes, as it were, incorporated with the soil, and is subject to the rules which regulate real property. And yet, once more, that same house

<sup>1</sup> See Bouvier's Dict. "Personal Civil Law, prel. book, tit. 3; 2 Bl. Chattels;" Webster's Dict. "Personal Com. 384-388; § 53 *post*.  
al;" Worcester's Dict. *do.*; 1 Domat



may, in the lapse of time, be pulled down ; and the building materials may then be sold, as such, and acquire again the characteristics of personal property, whatever the article be styled in its various modifications.

Therefore, a thing may be first real, then personal, then real again, then personal again ; and indeed the changes may go on, indefinitely, so long as the thing itself lasts. Nor is its identity necessarily lost in this process, nor need a great variety of names be applied to an original substance undergoing the transmutation ; since a growing tree might first be taken from a nursery ; next, pass for sale in the market as personal property ; and, lastly, be transplanted and grow up in a new soil, where the law would regard the tree as part of the soil itself.

§ 5. **Things Movable are Animate or Inanimate.**— Things movable may be further separated into things *animate*, and things *inanimate* ; that is, into such things, the subject of ownership, as can move themselves, namely, animals ; and those things which are inanimate and movable only through the application of force from without. Human beings, happily, cannot at this day be the subject of property at all, by the English or American law ; but where slavery once existed man was classed with things personal ; and all the lower animals, so far as they are owned, are subject to the law of personal, and not real, property, since they are to be deemed movables.

§ 6. **Duration of Enjoyment considered ; Peculiar Distinction at Common Law between Freehold and Chattel.**— If, then, we were permitted to treat these elementary divisions of things real and things personal as corresponding in meaning with the civil law terms, *things immovable* and *things movable*, our definition of personal property would be an easy one. But, at the common law of England, we find another element introduced for our consideration, as concerns things real ; namely, duration of the time of enjoyment. The feudal system, which prevailed in the early days of English law, ascribed to the possession of landed estates an especial importance. During the Middle Ages trade and commerce

were neglected; Jews became the capitalists, and capitalists were the prey of the barons; it was the ancestral acres alone which the ambitious and aspiring learned to regard with favor. Men fight and struggle for that which will best ensure them influence and social position; so, until a comparatively late period, the Anglo-Saxon found his worldly wishes for property and rank gratified chiefly, if not altogether, in the possession of real estate of a freehold character, with a tenantry beneath him, and hereditary honors to receive and transmit. Such, indeed, must be the natural bias of a rude and uncultivated, though vigorous race; for agriculture is the primitive employment of mankind, while the jurisprudence of movable property can only be perfected where commerce, manufactures, and the liberal arts flourish.

To be a freeholder, then, was to be a man of property indeed; and a freehold might be either one of inheritance, or for life only. But every estate in lands and tenements which fell short of a life interest was without dignity, and could not be deemed a freehold at all. Herein consisted the dignity of a freehold; that it should last for an indeterminate period of some sort. Any landed interest, expressed to be for a positive length of time, though it were for a thousand years, and logically more than a life interest, fell short of the rank of real estate; not being a fee, it did not attend the inheritance, nor could it be classed with lands and tenements at all. What kind of property, then, was such an estate in lands? Not, in all respects, movable property; and yet so little concern had the common law for interests less than freehold, that it stopped with denying them the rank of immovable property. One general designation sufficed for such inferior interests and for movables proper alike; whether leases for years, or money, farm stock, and furniture, all were comprehended under the name of chattels. As Blackstone gives the rule, whatever wanted either of two qualities, duration as to time, or immobility with regard to place, could not be, according to English law and the Norman custom, a real estate; consequently, it must be personal estate, or a *chattel*.<sup>1</sup>

<sup>1</sup> 2 Bl. Com. 386; 1 Co. Inst. 118 b; 2 Kent Com. 341, 342.

§ 7. **Personal Property or Chattels in our Law the Residuum of the Freehold.**—It is obvious, therefore, that the word “chattels,” at the common law, was never applied, in a strict sense, to things personal; that it did not serve to mark an exact contrast; that it had rather a negative than a positive signification. Instead of movables and immovables, we have freeholds and chattels. Instead of a property system which should display two distinct classes of equal importance, we find in the common law a sort of one-sided scheme. The jurisprudence of lands and tenements, artificial to the last degree, was the pride of the early English lawyer; for chattel learning he cherished little else than a profound contempt. Yet the last three centuries have wrought an entire change; and with the revival of trade and commerce came new species of personal property, such as bills and notes, and bonds and other securities for debt, to which are more lately added shares in stock companies, insurance policies, patent-rights, and the like; all of these attesting the development of new sources of wealth, and the re-establishment of personal property—a jurisprudence once nearly buried in the rubbish of the great Roman Empire—as the co-equal of real property, if not indeed its superior, in legal importance.

We may do well, then, to avoid attempting a positive and exact definition of the term “personal property;” contenting ourselves with reminding the reader that what is now known as personal property was, at the common law, but the residuum of the freehold; and that such is the state of the law to-day, save where local statutes have made it otherwise.

§ 8. **What is a Chattel at the Common Law.**—Since “chattels” is the term usually employed at the common law to denote personal property in general, let us examine its meaning for a moment. It follows, from what has been already observed, that every species of property, movable or immovable, which is less than a freehold, must be a chattel. The origin of the term “chattel” is somewhat obscure. Coke says it is a French word, and signifies goods, “which, by a word of art we call *catalla*.”<sup>1</sup> And Blackstone observes: “The appella-

<sup>1</sup> 1 Co. Inst. 118 b.

tion is in truth derived from the technical Latin word *catalla*, which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all movables in general."<sup>1</sup> This derivation, if correct, serves to mark the simplicity of life in the early days of our law, when live stock could suffice as the representative of personal wealth. But some allege that the word "chattel" is contracted from *capitalia*, *capital*, from *caput*, "a word used in the Middle Ages for all goods, movable and immovable;" while others suggest that it possibly originated in a root signifying to get or possess, whence sprung also the Italian word *catarre*.<sup>2</sup> Words are, after all, but the tools of the wise, fashioned after the common understanding of the day; and the symbols of etymology, though furnishing valuable aid in historical researches, may prove a blind guide to those who seek some lasting plan of consistent classification. Our English ancestors appear to have followed the Norman law in opposing the idea of chattel to that of feud or freehold.<sup>3</sup>

§ 9. *Chattels Real and Chattels Personal*. — In accordance with the foregoing distinctions, there are two leading classes of chattels set forth by the common-law writers: namely, *chattels real* and *chattels personal*. (*Chattels real* are interests less than freehold, which are annexed to or concern real estate; such as a lease of land for a certain number of years. *Chattels personal* are, properly and strictly speaking, things movable, which may be carried about by the owner, and which accompany him at law wherever he may go. Animals, household goods, stock in trade, money and jewels, are chattels personal. So, also, are bills and notes, certificates of the public debt, corporation shares, legacies, loans on collateral security, and, indeed, debts, demands, and claims generally.<sup>4</sup> These subjects will be considered at length in succeeding chapters.

<sup>1</sup> 2 Bl. Com. 385. See Bouvier's Dict. "Chattel." Century Dict. ib.

<sup>2</sup> See Webster's Dict. "Cattle."

<sup>3</sup> 2 Bl. Com. 385, 386.

<sup>4</sup> See 1 Co. Inst. 118; 2 Bl. Com. 386, 387; 2 Kent Com. 340-342; Wms.

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§ 10. **Fixtures, Heirlooms, and Emblements.** — But there is a border line which runs between real and personal property, freeholds and chattels, things immovable and things movable, which, as we approach it, cannot always be easily distinguished. Thus, a house firmly imbedded in the ground becomes part of the soil, and passes for immovable or real property. This is law. But a wooden shed might be built, which not only could be taken away in point of fact by its owner, but which he actually intended should be taken away and moved from place to place. Now, would the latter be personal property, or would it be real estate; part of the freehold or a mere chattel; a thing movable, or a thing immovable? Nay, there are late instances which some of our city readers may recall, where a large building of several stories has been lifted from its foundations and safely transported to an adjoining lot of ground; so wonderful are the appliances of mechanical art in these days. Whether things of a personal nature attached to the soil are legally chattels or not, must often therefore depend upon circumstances; and various important questions are raised in the courts, which we shall consider at length hereafter, under the head of “Fixtures.”<sup>1</sup>

So, too, there are other chattels which the law permits to go with the freehold in case of the owner's death as heirlooms, instead of following the usual rule of distribution; this, partly from the consideration of inherent qualities, partly because of custom, and partly no doubt for mere convenience' sake or general policy. These, as well as the right to take away ripe crops, in certain contingencies, as emblements, require special treatment, likewise; and they will constitute the subject of a special chapter.<sup>2</sup>

§ 11. **Choses in Possession and Choses in Action.** — There are other terms of familiar use in the law of personal property. Thus, *chose* is a well-known French word signifying “thing,” which was imported into Great Britain by the Normans, as a term to be applied with especial, if not exclusive, reference to personal property. This word appears constantly in those bungling and barbarous phrases, *choses in*

<sup>1</sup> See *post*, c. 6.

<sup>2</sup> See *post*, c. 5.

*possession* and *choses in action* ; or, to use the vernacular and better words, things in possession, and things in action.

The distinction which the law means to make by the use of these phrases seems to be more generally recognized than understood. The elementary writers tell us that *choses in possession* are personal things of which one has possession ; and that *choses in action* are personal things of which the owner has not the possession, but merely a right of action for their possession. Or, to use the words of Blackstone, "Property in chattels personal may be either in *possession*, which is where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing ; or else it is in *action*, where a man hath only a bare right, without any occupation or enjoyment."<sup>1</sup> If, then, my coat be stolen, and I seek to recover it from the thief, is it not my *chose in action*? No, is the answer: the coat is a *chose in possession*, whether you possess it or not. Or, if I own bank-stock, and draw regular dividends, is not the stock a *chose in possession*, since I occupy and enjoy it to the fullest extent? No, is the reply once more ; for this is never any thing more than a *chose in action*. These terms, then, are certainly calculated to mislead ; they do not intend just what they appear to express ; and whoever reads Blackstone's chapter on "Property in Things Personal,"<sup>2</sup> should perceive that he confounds two senses of the word "property," the one signifying the thing possessed, the other the right of possessing. ?

This classification of property into *choses* or things in possession, and *choses* or things in action, is, in truth, a classification according to inherent qualities, and not with regard to the measure of the right of enjoyment at all. It is, as we are fully convinced, but a sort of modification of the more expanded idea of things corporeal and incorporeal ; and this mode of classification results from the attempt to discriminate between objects of the sense and what are mere rights. Now, this grand division of property into things corporeal and things incorporeal is a perfectly natural and obvious one ;

<sup>1</sup> 2 Bl. Com. 389. 397. See Bouv.      <sup>2</sup> 2 Bl. Com. c. 25.  
Dict. "Chose;" 1 Chitty Pract. 99.

we readily understand that while some things are objects of the sense, and capable of being seen and touched, others have but a legal or ideal existence. Spain, Holland, Scotland, and certain other European countries whose jurisprudence is based upon the civil law, have recognized such an elementary division quite distinctly; and the same is true of Louisiana, and perhaps other American States.<sup>1</sup> Lands and houses, under this system, are to be regarded as corporeal species of property, for they may be seen or touched; so are cattle, jewels, and household furniture. But a right of way in lands is incorporeal; so is the right to recover an unpaid debt. The civil law, in the time of Justinian, classified into immovables and movables, which together constituted corporeal property, and to these added incorporeal property or rights.<sup>2</sup> The old common law applied no such system of classification, in so many words, to personal property; and yet the distinction of corporeal and incorporeal was employed with reference to things real from the earliest period. Thus, the elementary writers laid it down that commons, ways, and franchises—all rights appertaining to real estate—were incorporeal hereditaments, because they were rights existing only in the mind, whatever might be said of their effects or profits; while, on the other hand, land and water were corporeal hereditaments, because they could be seen and handled by the body.<sup>3</sup> More than this: the very word “hereditament,” though practically restricted at the English law in its application, has a theoretical significance, ample enough, apparently, to justify its extension to our present subject; for, to use Coke’s own language, it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal, or mixed. And Blackstone defines the incorporeal hereditament as “a right issuing out of a thing corporate (*whether real or personal*), or concerning, or annexed to, or exercisable within, the same;” and one of the examples given is that of an office relating to jewels.

<sup>1</sup> See 2 Burge Col. and For. Laws, 3.

<sup>2</sup> 2 Bl. Com. 18-21; Co. Lit. 19, 20.

<sup>3</sup> Colquhoun Rom. Civil Law, § 932;

1 Dom. Civil Law, § 130.

This shows that the idea was entertained of incorporeal rights annexed to corporeal chattels, as well as of those rights which savored only of real estate.<sup>1</sup>

§ 12. **The Same Subject: Better Classification would be into Corporeal and Incorporeal Chattels.**— Whether the better plan is not to put corporeal immovables and movables by themselves, and then to add incorporeal rights as another and distinct class of property, following the Roman rule of the time of Justinian, we need not now discuss. Suffice it to say, that the apportionment of rights between the two great systems of property, real and personal, is a feature too deeply woven into the texture of our law to be separated without damaging the whole fabric. To take, then, the hint thrown out in the definitions of Coke and Blackstone, we might say, that rights issuing out of lands, such as a right of way, and privilege of fishing or pasture, should be referred to the topic of real property, while rights issuing out of or reducible to the personal corporeal thing we call money, such as debts, demands, and claims arising from contracts or a wrong, or issuing out of, or concerning, or annexed to any other personal corporeal thing, should be referred to the topic of personal property; or, to be more logical (since a house-rent might, perhaps, be referred to both topics on such a principle of classification), that under the latter head are to be included all such rights or incorporeal hereditaments as are not specially annexed to lands or immovable property, and do not issue out of or immediately concern the same. Then, whether the student were analyzing the law of real or of personal property, he would find this leading distinction before him, of things which can be seen or touched and things which are not the objects of the bodily senses. The one great property system would correspond with the other, and both would conform to universal law. He would see why we separate a debt from an animal in classification; why, too, a different principle applies to general balances due from our banker and to a sealed bag of money left in his custody on special deposit. Proceeding a step further, he would learn that bills and

<sup>1</sup> See 2 Bl. Com. 20.



notes, certificates of stock, registered securities, and the like species of personal property, so common in these days, are but the evidence of incorporeal rights, and not, in strictness, corporeal property, — a truth not, perhaps, self-evident, yet capable of demonstration, and upon which are founded some of the most important general doctrines of the law touching things personal. A better style, therefore, than *choses* or *things in action* would be *rights in action*.

If this plan of classification, into things corporeal and things incorporeal, be so desirable, some one may ask, why was it not originally applied, at the common law, as well to personal as to real property? We reply: because, in all probability, of the comparative unimportance of the topic of personal property in the days of Blackstone and his predecessors. It is not to be supposed that the early teachers of the common law, many of them wise and learned for their age, were without ideas on such subjects. Yet while they gradually worked out a real-estate system of jurisprudence, refining upon subtle refinements, they did not treat the subject of chattels as it deserved. In the first place, they took no pains to set off the two systems of property, real and personal, side by side, and to see how far their principles could be harmonized. In the second place, they had got hold of this distinction between *choses in possession* and *choses in action*, which answered their purpose sufficiently for the time being; although, while not seemingly aware of it, they meant about the same as to distinguish between corporeal things personal and incorporeal things personal. The *choses in possession* consisted of things which could be seen and touched, like animals, corn, and jewels. The *choses in action* were, as we understand it, mere rights; and as the enforcement of these rights is by suit or action, we may suppose that while simple debts or claims for damages constituted almost the only incorporeal personal rights in the community, the term *choses in action* fitted.

§ 13. **The Same Subject; Rights of Dominion affected by Title.** — Upon the one or the other method of distinction rests much of the law of personal property in force at the present

day in England and America, as we shall have occasion to notice in the course of this treatise. And the reader should always keep in mind that the ownership of property — that is, the exclusive right to possess, enjoy, and dispose of a certain thing — or its dominion, may be very greatly affected by its situation in the hands of parties, whatever may be its inherent qualities. One may be the buyer, another the seller, with reference to the same thing; one the assignor, another the assignee; one may bequeath, another may inherit; and so on. Such questions properly come up in considering the subject of title to property; and the rules of title will be found to differ according to the inherent attributes of the property; whether it be an immovable or a movable, whether it be a thing corporeal or a thing incorporeal.

§ 14. **The Same Subject; How Things Incorporeal become Corporeal, etc.** — Another truth should be borne in mind by the reader, to come more closely to the subject we are now considering; namely, that the thing incorporeal, or the money right, or *chose in action*, may be converted into a thing corporeal, or a *chose in possession*, and thus become in fact the latter, or be extinguished altogether. Thus, a legacy, which is an incorporeal right, may be paid up; and in this case there is no longer the legacy, as such, but there is money or the other specific personal property in its place. And so with any kind of a debt. The reduction into possession, as it is called, of the wife's *choses*, is an important element for consideration at the common law, in determining the rights which the husband acquires by marriage in his wife's personal property.<sup>1</sup> And yet, in order to change a thing incorporeal into a thing corporeal, an action may or may not be brought, according to circumstances. What we call the personal property of one may be what another owes.

§ 15. **The Same Subject; General Conclusion as to Corporeal and Incorporeal Personal Property.** — With the growth of mod-

<sup>1</sup> See Schouler Dom. Rel. 3d ed. § 84. wife's *choses in action* is necessarily the same thing as the conversion or extinguishment above stated. The writer is not to be understood as meaning to assert that the technical "reduction into possession" of the

ern stocks, bonds, and negotiable instruments, has come a disposition to find some broader basis to rest a system of property classification upon; and this we conceive can best be found in the simple, natural, and comprehensive divisions which the Roman law preserved: first of things immovable and movable, next of things corporeal and incorporeal. And towards these divisions there seems to be a decided tendency in our law at the present day. Burge, who, in his extensive work on Colonial and Foreign Laws, handles the civil and common law systems together, making one mode of classification serve for both, divides property into real and personal, or immovable and movable property, and treats first of real and personal corporeal property, next of real and personal incorporeal property.<sup>1</sup> Our own great jurist, Kent, has avoided, in his Commentaries, the logical confusion manifested by Blackstone in respect of the meaning of the word "property." He considers the topic of absolute and qualified property (that is, ownership) by itself, and apart from that of things in possession and things in action. And upon the distinction of *choses* he does not strongly attempt to found a difference; on the contrary, one may see that, while he refrained from disputing the older authorities, there lurked in the author's mind the idea of a better classification into corporeal and incorporeal things.<sup>2</sup> Moreover, he defines things in action as "personal rights not reduced to possession, but recoverable by suit at law."<sup>3</sup> And he confidently asserts that the civil law was much more natural and much less complicated in the discrimination of things than the common law; dividing them, as it did, "into the obvious and universal distinction of things movable and immovable, or things tangible and intangible."<sup>4</sup> And, finally, our latest writer, Mr. Williams, — the only person of repute who has hitherto undertaken to prepare an elementary work on Personal Property, — stumbles over this ancient classification of *choses in posses-*

<sup>1</sup> 2 Burge Col. and For. Law, 6-46.

<sup>2</sup> 2 Kent Com. 340, 347, 351. Cf. 340, note, probably written by the Chancellor himself, to the effect that

personal property may include not only everything tangible, but things "quasi-tangible, as *choses in action*."

<sup>3</sup> 2 Kent Com. 351.

<sup>4</sup> Ib. 347.

sion and *choses in action*, and finds it quite unsuitable for application to such modern species of property as shares in stock companies, patents, and copyrights, and the like; and he says that while these are usually spoken of as *choses in action* "for want of better classification," they are, in fact, personal property of an incorporeal nature.<sup>1</sup>

We intend, therefore, in the present treatise, to contribute, as far as possible, to logical precision, by substituting the distinction of corporeal and incorporeal things personal for that of *choses in possession* and *choses in action*; believing, as we do, that we shall thereby do something towards reconciling and harmonizing the two grand divisions of wealth known to the English and American law; and, furthermore, aid in bringing the civil and common law systems of property into something like unity. We shall not, like Mr. Williams, sacrifice consistency to custom, by compromising upon a method of classification, which recognizes one division consisting of *choses in possession*, a second of *choses in action*, and a third of *incorporeal personal property*;"<sup>2</sup> for this, in the end, must bring only confusion. But we shall, so far as may be, use the new terms as synonymous with the old; and bring out such points of difference, if any, as may be suggested by a careful comparison of things corporeal and incorporeal with things in possession and things in action.

§ 16. **Meaning of the Terms "Goods," "Effects," "Things," etc.** — There are some other technical words, besides "chattels" and "*choses*," which the common law has employed with reference to personal property from a very early period. Thus, "goods" is a favorite word, which is used either conjointly with other words, or by itself. The phrase "goods and chattels" is often found in deeds and wills; conveyancers favor it strongly; and, certainly, when placed in contrast with the seemingly corresponding phrase "lands and tenements," it has a pleasant jingling sound. This phrase plainly includes chattels real, and inanimate objects, — as indeed does the sin-

<sup>1</sup> Wms. Pers. Prop. 5th Eng. ed. 6.    <sup>2</sup> See Wms. Pers. Prop. Table of  
See also the definition of "Incorporeal Property" in Bouvier's Dict. Contents; and cf. ib. pp. 5, 6, 180.

gle word "chattels;" and it is well settled that, if unrestrained, the term "goods and chattels" will pass all personal property under a will.<sup>1</sup> This, we suppose is chiefly attributable to the force of the comprehensive word "chattels." As to the term "goods," standing by itself, the general impression is, that it has a more confined operation in modern times than chattels; that while for most purposes it includes money, furniture, valuable securities, and other mere personal chattels, and is a word of large general signification, it neither embraces chattels real, such as a lease for years of house or land, nor, perhaps, animals, — which the word "chattels" certainly would include.<sup>2</sup> In a more limited sense the word "goods" is popularly applied to articles of merchandise.<sup>3</sup> The civil-law term *bona*, which corresponds with goods, included all chattels, personal and real alike; and therefore a general bequest of all one's goods will pass a leasehold interest, because the civil law guides in the construction of bequests of personalty; while an assignment, which must be construed according to the rules of the common law, will not, as Sugden thinks, pass a leasehold estate.<sup>4</sup> The corresponding French term *biens* is said to include property of every description, except estates of freehold and inheritance.<sup>5</sup> Coke must have thought that the word "goods" had an equally sweeping force, for he says: "Goods, *biens*, *bona*, includes all chattels, as well real as personal;" and he further adds: "Now goods, or chattels, are either personal or real."<sup>6</sup> And others have treated the two words "goods" and "chattels" as synonymous.<sup>7</sup>

"Effects" is another word which is often found in the law of chattels. This word is equivalent to property or worldly

<sup>1</sup> See 12 Co. 1; 1 Atk. 182; *Gower v. Gower*, Ambl. 612; *Wms. Ex'rs*, 4 Edw. VI.; *Cro. Eliz.* 386; 1 P. *Wms.* 6th Eng. ed. 1095; *Bouvier's Dict.* 267. "Goods and Chattels;" Co. Lit. 118 b.

<sup>2</sup> *Bouvier's Dict.* "Goods;" 2 Sugd. Vend. 9th ed. 201; *Kendall v. Kendall*, 4 Russ. Ch. 370. See *Baldwin v. Williams*, 3 Met. 367.

<sup>3</sup> 2 Bl. Com. 389, *Sharswood's n.*; *Worcester's Dict.* "Goods."

<sup>4</sup> 2 Sugd. Vendors, 9th ed. 201. See 4 Edw. VI.; *Cro. Eliz.* 386; 1 P. *Wms.* 267.

<sup>5</sup> *Bouv. Dict.* "Biens."

<sup>6</sup> Co. Lit. 118 b.

<sup>7</sup> See *Wms. Pers. Prop.* 5th Eng. ed. 2; *Webster's Dict.* "Goods;" *Worcester's Dict.* "Goods."

substance, and, when used with the words "real and personal," it embraces the whole of a testator's real and personal estate; indeed, the word "effects" alone, in a will, may carry the whole of one's personal property; though not the real estate, except in connection with the word "real." It would thus appear that the word "effects" denotes property in a more extensive sense than the word "goods."<sup>1</sup>

But while, under favorable circumstances, the word "chattels," or the word "effects," or even the word "goods," may carry the entire personal property of a testator, it should be remembered that, where general terms are associated with others less comprehensive, in wills, they are sometimes restrained in judicial construction to articles *ejusdem generis*. And since the fundamental rule applied to the interpretation of last wills and testaments is to make the testator's intention the pole-star, we may sometimes expect to find such sweeping words as "estate," or "property," restrained, so as to apply only to personal property, in like manner, and not to lands and tenements.<sup>2</sup>

The reader may have already perceived that we make frequent use of the word "things," in treating of our present subject. By this word "things" is understood every object, except man, which may become an active subject of right; in which sense it is opposed, in the language of the law, to the word "persons."<sup>3</sup> It may therefore be considered as nearly or quite synonymous, at our later law, with the word "property;" besides being often a more convenient word to apply in legal analysis than the latter, since its singular and plural forms are readily distinguished in composition, and since there are no such variations in its technical meaning as would be likely to produce confusion in the mind of the student.

§ 17. Application of "Estate" to Things Real, and "Property" to Things Personal. — An important distinction which is ob-

<sup>1</sup> See Bouvier's Dict. "Effects;" 2 Bl. Com. 384, Sharswood's n.; Jackson v. Hogan, 8 Bro. P. C. 888; Campbell v. Prescott, 15 Ves. 507; Cowp. 299; 83 Penn. St. 126; 6 How. (U. S.) 301.

<sup>2</sup> See Jarm. Wills, 3d Eng. ed. 715 *et seq.*

<sup>3</sup> See Bouv. Dict. "Things." And see Rapalje's Law Dict.

servable between the two great systems of property known to the common law remains for our present notice ; and it is a distinction which should be steadily kept in view by all who seek to understand the exact meaning of legal terms in their investigation of the law relating to things real and personal. From the very nature of the feudal system, it was impossible that one should be, wherever that system continued in force, the absolute owner of lands and tenements. These were, on the contrary, the subject of tenure ; that is, they were *held*, under a lord paramount, and not owned. The sovereign, or chief, divided the lands among his immediate followers, exacting a recompense, in the nature of military service, or supplies, as the case might be ; they, in turn, subdivided among their followers, and upon similar conditions. This feudal system moulded the English law of realty ; and though the military tenures were abolished at the restoration of King Charles, and most of the absurd exactions of chivalry — which, as may well be supposed, had come down to mere pecuniary assessments — were thus done away with, yet names remained, and the ancient theory was in many respects unchanged.<sup>1</sup> Hence is it that the elementary writers still tell us that there is no such thing as *property* in realty at the common law ; that of things real there can be nothing held and enjoyed save an *estate* ; which estate may be for life, in tail, or in fee-simple, according to circumstances, but in any event is an estate and no more.<sup>2</sup> Yet, as they say further, the primary rule concerning things personal has always been precisely opposite. These are the subject of actual ownership, and are not held for any estate ; one has them as one's own property. However fanciful the distinction may now appear, especially to us of America, who never doubt that a deed of land, to one and his heirs forever, practically conveys the land, as so much property, to the grantee, we must nevertheless accept the theory ; and thus we shall perceive why the expression “ real estate ” is so commonly used in the English tongue, and among unprofessional men, rather than “ real property ; ” though one finds the latter term quite

<sup>1</sup> See 2 Bl. Com. cs. 5, 6.

<sup>2</sup> Wms. Real Prop. 9th Eng. ed. 17.

convenient when he desires, as the writer in the present chapter, to contrast things real with things personal. We would use the words "personal property" in speaking of goods and chattels, on the other hand, more commonly than the words "personal estate," for a corresponding reason; though, in a last will and testament, where dispositions under the two great classes of property have to be constantly brought together, the phrase "personal estate" is not unfrequently used as usually in administration. So, too, if we take up some old writer, — Coke, for instance, — we find him defining the word "estate" as an inheritance, a freehold, term for years, or the like, in lands or tenements, without referring to chattels.<sup>1</sup>

But we must not be tied down too closely to words in their ancient significance; suffice it that we hold to the correct modern idea. The word "estate" is doubtless used in a broad sense, in these days, to denote both things real and things personal; and the same may be said of the word "property." Consulting our own convenience in a reasonable degree, we shall use the words somewhat indiscriminately; not forgetting, however, — as the reader should not, — that the more technical and limited application of the word "estate" is to things real, while that of the word "property" is to things personal; for upon this distinction are founded some curious and interesting doctrines.<sup>2</sup>

§ 18. **Classification into Real or Personal affected by Modern Legislation.** — It should be further observed, however, at the outset, that while at the common law one thing may be real and another personal *per se*, the classification is frequently affected, in this day, by statutes. Thus, in Massachusetts, a term of years, so long as fifty years or more remain, is made subject to the incidents of freehold estate, by legislative authority.<sup>3</sup> So, on the other hand, stock in canal, railway, and land companies, which the law was formerly disposed to treat as real estate, are usually in this country made personal prop-

<sup>1</sup> 1 Co. Lit. 487.

<sup>3</sup> Mass. Pub. Stats. 1882, c. 121, § 1.

<sup>2</sup> See Bouv. Dict. "Estate;" Wms. Pers. Prop. 3d Eng. ed. 7, 8.



erty by positive enactment to that effect; and such is the tendency likewise of the late English legislation.<sup>1</sup>

§ 19. **Chattels Real, Chattels Personal, and Chattels of a Mixed Description, to be considered in Order.**—In the next and succeeding chapters we shall develop more fully the nature and leading incidents of Personal Property; using the comprehensive term “chattel,” which is still indispensable to our jurisprudence. This will lead us to the consideration, first, of chattels real; next, of chattels personal; and afterwards of chattels which descend to the heir, emblements and fixtures. Enough, we trust, has already been said, to place our leading definitions clearly before the reader’s mind, and enable him to follow our method of treatment understandingly.

## CHAPTER II.

### CHATTELS REAL.

§ 20. **Chattels Real defined.**—Chattels real, says Sir Edward Coke, are such as concern or savor of the realty.<sup>2</sup> And Blackstone characterizes this species of property as being “of a mongrel, amphibious nature.”<sup>3</sup> In other words, chattels real are interests which are annexed to or concern real estate, yet are themselves to be regarded as personal property. A chattel real—or perhaps, to speak with strictness, the realty with which it is concerned—is an immovable and cannot be carried from place to place; but the length of time for which it may be enjoyed is limited and definite. Such an estate is less than a freehold, and therefore it cannot be real estate; so it must be, according to the logic of the common law, a chattel, and hence subject to the rules which relate to personal property.<sup>4</sup>

<sup>1</sup> See Wms. Pers. Prop. 5th Eng. ed. 192; 2 P. Wms. 127; chapter on “Stocks and Shares,” *post*.

<sup>2</sup> 1 Inst. 118.

<sup>3</sup> 2 Bl. Com. 887, 888.

<sup>4</sup> See *supra*, § 7. And see Prichard v. Prichard, L. R. 11 Eq. 232.

§ 21. **Term of Years the only Important Chattel Real; Attendant Terms and Leases Distinguished.**— In former times, as one may perceive by referring to Coke and Blackstone, there were several species of property enumerated under the head of Chattels Real; but of these the only kind of present consequence, and that which has always been most readily taken by way of illustration, is the term of years; a topic fully discussed in works on the relation of landlord and tenant, and appertaining to the tenancy of lands. To an English student this topic is found to branch off naturally into two divisions: the first embracing all contracts for the possession and profits of land for some determinate period, yielding the recompense of rent; the second consisting of those terms which are created by marriage settlements, wills, deeds of trust, and the like, — these last usually reserving no rent, but serving as a security for the payment of money borrowed by some one who has the freehold.<sup>1</sup> Terms of years, in the first sense, rarely last longer than a hundred years, and are generally of much shorter duration. But in the second sense a term of years is not unfrequently made out for a thousand years.

In the United States, we have abolished the doctrine of primogeniture, and our public policy sets strongly against fettering the free transmission of property; so we know and care very little about the terms of years which serve as security for borrowed money. But contracts for the possession and profits of land for a specified term of years — which we generally designate by the word “lease” — constantly occupy the attention of American courts; and they constitute a very important and frequently a very valuable species of personal property. And to chattels real of this description we may well devote our first and fullest attention in the present chapter.

§ 22. **Leases in General; Their History, etc.** — The student who has made himself familiar with the law of real property hardly needs to be reminded that the word “lease” is used to denote that species of contract by which the term in question

<sup>1</sup> See Wms. Real Prop. 9th Eng. ed. 372; 4 Kent Com. 85 *et seq.*

is created ; that the person who grants the lease is the *lessor*, while he to whom the lease is granted is the *lessee* ; and that the compensation or consideration of the lease is usually styled the *rent*.<sup>1</sup>

Leases are to be found among all civilized nations ; and, indeed, contracts of this character must be indispensable among mankind, so long as one is the legal owner of lands which another may wish to occupy for valuable purposes. But the length of the lease is made subject, in different countries and under different circumstances, to great variation. Leases among the ancient Romans were usually made of short duration, as the *quinquennium*, or term for five years ; and Chancellor Kent says that such has been the policy and practice of several modern nations, as France, Switzerland, and China.<sup>2</sup> In England, leases have usually been from year to year, and the farmers who till the ground hold by a very precarious tenure ; but we apprehend that more extensive terms are created in the populous districts where trade and commerce centre.<sup>3</sup> In the United States, agricultural leases are not very common. The farmer is usually proprietor of the acres which he cultivates ; and rarely would one of that class of men be tempted to take a lease at all. For in all of the States, one of small means may purchase the land he needs on making partial payments ; mortgaging back the premises, if need be, to secure the balance of the purchase-money. Or the farmer may go to the far west and earn a free homestead on the public domain, rendering no other recompense than his labor in improving it. But mechanics, men of mercantile and professional pursuits, and others who swarm in to the cities, very commonly take lands on lease, either to occupy as homes, or for warehouses and stores, and for business purposes generally ; capitalists being the usual landlords. Here we find that leases are, on the whole, rather short ; a necessary consequence of the rapid fluctuations to which real estate

<sup>1</sup> See Bouv. Dict. "Lease," "Landlord and Tenant ;" 1 Washb. Real Prop. 3d ed. 292-297.

<sup>2</sup> 4 Kent Com. 94, and authorities cited.

<sup>3</sup> See 2 Bl. Com. 142, n. ; Wms Real Prop. 9th ed. 372.

is subject in new centres of trade, the frequency with which property changes hands under our system of laws, and that flexibility of purpose and pursuit which strongly characterizes American society. It may be said that leases in this country average about five years, being frequently for a much shorter period, and rarely extending beyond ten years. In some States, leases for a greater period than fifteen or twenty years, under certain qualifications, are even prohibited by law; this, apparently, because of the injustice likely to be done to personal representatives of the lessor rather than to the lessee, or those who succeed to his rights,<sup>1</sup> and also because of the general impolicy so considered of fettering real estate. Covenants for renewal, of which we shall presently speak, are frequently found convenient where one wants the opportunity of prolonging his lease without being bound too closely to a contract which might not prove beneficial to him. And it is only testamentary trustees, or others holding lands in a fiduciary capacity, who, in this country, will be strongly tempted to let property on long leases; and that, only because of the restrictions upon sales, exchanges, and improvements to which the law may have subjected them, and because transfers of such real estate are impeded in any case, or in order to escape petty annoyances in the management of estates for the sole benefit of others, to which they do not feel prepared to submit. It is true that the policy of short leases, as Chancellor Kent shows us, has been condemned by Gibbon and other distinguished writers as discouraging agricultural enterprise and costly improvements; but an objection of that sort seems hardly tenable, in the case of a people whose lands, and especially farming lands, are thrown freely upon the market for purchase and sale, so that he who begins life a tenant may hope to die a freeholder.<sup>2</sup>

§ 23. **When a Lease begins.**—Leases for years may be made out so as to take effect at some future period; and this

<sup>1</sup> See 4 Kent Com. 93, and notes. characteristics of a freehold. *Supra*, § 18.

We have seen that various statutes in this country give to leases of a considerable duration the essential <sup>2</sup> See Gibbon's Hist., vol. viii. 86, note, and other writers cited, 4 Kent Com. 94, n.

for the technical reason that they are mere chattels, and require no livery of seisin. Thus a lease may be made for ten years from next Christmas.<sup>1</sup> The lease itself, however, in such a case, does not confer a complete tenancy. It only gives the lessee, as against his lessor, a right to enter upon the premises, which right is called his interest in the term, or *interesse termini*; and it is not until the lessee has actually entered, that the estate becomes fully vested in him, and he is possessed in a just sense of the term of years.<sup>2</sup> To this rule an exception is found in cases where the lease is made by bargain and sale, or by any other conveyance operating through the force of the Statute of Uses; for here the lessee will have the whole term vested in him at once, just as though he had actually entered. In the former case, there was a common-law lease, which required entry to give it effect; in the latter, the valuable consideration operates by way of bargain and sale, and raises a use to the lessee which the statute executes.<sup>3</sup>

§ 24. *Term of a Lease.* — Leases for years are necessarily for a certain determinate period of time; and the fact that interests of this sort must expire at a specified date suggests the legal designation “term,” or boundary. Every estate, indeed, which possesses this quality, by whatever words created, is, as Blackstone observes, an estate for years. We may know that it is such an estate because it lasts for a certain prescribed period, and no longer. Yet there is a well-known legal maxim, that whatever can be construed into certainty is itself certain. Hence it follows that I may make a good lease for years by designating the term to be for so many years as A. B. shall name; since the moment A. B. has named the number, though not before, the lease is reduced to a certainty.<sup>4</sup> But I cannot make a good lease to last while gold remains above par; for this would be to prescribe a

<sup>1</sup> 1 Prest. Estates, 204–206; 4 Kent Com. 94; Wms. Real Prop. 364; 2 Bl. Com. 143.

<sup>2</sup> Co. Lit. 46; 2 Bl. Com. 144 and n.

<sup>3</sup> Ib.; Wms. Real Prop. 169, 364; 2 Mod. 249. By this later invention

of an executory bargain which becomes self-executing we find that freeholds, as well as leaseholds, can be treated to commence in the future. Tiedeman Real Property, § 175.

<sup>4</sup> 2 Bl. Com. 143 and n.; Co. Lit. 46.

date which one cannot reduce to certainty; and, of course, to lease for a human life would be attempting to create a freehold. But I may make a lease for so many years, — ten, for instance, — provided another shall so long live; for here there is a certain period fixed, beyond which the term cannot last, though it may end sooner.<sup>1</sup> Leases like the foregoing are not likely to be made frequently at the present day; but the illustrations will aid in fixing important principles in the reader's mind. And it may be noted, in passing, that the word "term" does not signify the time specified in the lease merely, but the estate and interest that actually passes by the lease; so that, if a lease for five years were cancelled and surrendered at the end of two years, it might be said that the *term* expired before the *time*.<sup>2</sup>

§ 25. *Term of Lease as affected by Statute of Frauds; Written Lease required, etc.* — The Statute of Frauds, 29 Car. II. c. 8 (whose provisions, not without local modifications, have been generally adopted as part of the jurisprudence of this country), affects the law of leases very considerably. It declares, substantially, that leases, estates, or terms of years, or any uncertain interests in lands, made or created by livery only, or by parol, and not put in writing and signed by the party making the same, or his agent, shall have the force and effect of leases or estates at will only; an exception being made in favor of leases not exceeding the term of three years, where the rent reserved shall amount to two thirds, at least, of the full improved value of the land. And, further, that no lease or estate, either of freehold or term of years, shall be assigned, granted, or surrendered, unless in writing.<sup>3</sup> In most parts of this country the statute exception in favor of parol leases is for a less period than three years; one calendar year being the limit prescribed in New York and some other States, while in others a parol lease is deemed a tenancy from year to year, or from term to term, or, as local statutes may expressly provide, an estate at will only.<sup>4</sup>

<sup>1</sup> Co. Lit. 45, 46; 2 Bl. Com. 143 and n.

<sup>2</sup> 29 Car. II. c. 3, §§ 1, 2.

<sup>3</sup> Co. Lit. 45; 2 Bl. Com. 144.

<sup>4</sup> The English statute, as re-enacted in New York, requires the agent

So, too, the Statute of Frauds provides that every agreement not in writing and signed by the party to be charged therewith, or his authorized agent, is void, which by its terms is not to be performed within one year from the making thereof. Under this clause, which many of our States adopt, it is held that a verbal agreement to lease must commence from the making of the agreement, and not from a future day; though, in New York, where the language of the statute is somewhat different, a parol lease for one year, to commence *in futuro*, was not long ago upheld.<sup>1</sup>

What was the object of the Statute of Frauds in thus changing the common law? A tenant for years, at the common law, was, as we have seen, one who held for a certain term; and, notwithstanding the technical expression, this term might be for less than a year, as for a half-year, quarter, or month, or even a few days, provided only it were for a time certain. But a tenant at will, on the other hand, held for an uncertain period; his lease lasting while his landlord and himself jointly willed it so, and no longer.<sup>2</sup> While the latter tenancy often arose by implication, it might also be determined by an act inconsistent with the further duration of the estate, whether such act were performed by the landlord or by the tenant.<sup>3</sup> Tenancies at will were therefore

who signs to be "authorized by writing;" but in some of our States these words are omitted. See Story Agency, § 50. In other respects the New York statute differs from the English; particularly in authorizing parol leases for one year only, instead of three; being followed in this respect by California, Illinois, Virginia, Wisconsin, and many other States. New Jersey, Maryland, and North Carolina follow the English statute in respect to time, though adding nothing as to the reservation of rent. In Massachusetts, all estates and interests in land created without writing are declared to be estates at will only, while in Illinois, Iowa, and most of the south-western States, parol leases for a year are valid; and those

in excess of that period may prevail against the grantor, though not against third parties. See Browne, Stat. Fr. Appendix; Taylor's Landlord and Tenant, 8th ed. §§ 28, 29; 4 Kent Com. 95, and notes; Nesham v. Selby, L. R. 7 Ch. 406; 1 Stimson Am. Stat. Law, § 2002. The latest code in each State should be consulted on such a point.

<sup>1</sup> Smith Landl. and Ten. 62-65; Taylor ib. § 30; Rawlins v. Turner, 1 Ld. Raym. 736; 64 N. Y. 518; 5 N. Y. 463. See Delano v. Montague, 6 Cush. 42; Kelly v. Terrell, 28 Ga. 551.

<sup>2</sup> 2 Bl. Com. 140; Bac. Abr. Leases, I.; Smith Landl. and Ten. 14, 15; Taylor ib. §§ 54-58.

<sup>3</sup> Smith Landl. and Ten. 16, 17;

found to be a very inconvenient species of estate, and the courts would not favor them, inasmuch as they were too precarious, each party being at the mercy of the other; and so the judges seized upon every favorable opportunity of construing such an estate into a tenancy for years; or, at least, of ruling that the parties had manifested their intention to continue the tenancy until a reasonable notice to determine it should be given by one or the other. The circumstance that a yearly rent was paid afforded the presumption that the parties had intended to create a yearly tenancy rather than one strictly at will; and accordingly it became settled law, that, if a party entered into or remained in possession under circumstances which would constitute him a tenant at will, the payment or settlement in account of a yearly rent rendered him a tenant from year to year, and entitled him to a regular and formal notice to quit.<sup>1</sup> Now, a tenancy by express agreement may be either by word of mouth, by simple writing, or by deed; and so with any other contract. The great object of the Statute of Frauds was to discriminate in favor of contracts in writing, — or, to use a common expression, to make men put their bargains into black and white, — so as to furnish plain evidence of the mutual intent of parties in their agreements; and the policy of this statute is directed to such agreements as involve large sums, or are necessarily complicated in terms, or concern others besides the original parties, or run for a long period. As to tenancies, its design was, in the first place, to get rid of the prevailing perplexity and confusion, where lands were let out for a long time, and involved large pecuniary sums, by requiring such leases to be in writing. With short terms it did not greatly interfere, but left them pretty much as before.

§ 26. **The Same Subject; Whether a Seal is Essential; Effect of Term not within Statute.**— It should be added, that while the statute of Charles the Second sanctions leases without seal as well as by deed, if only the agreement be in writing, a later English statute, passed in the reign of Vic-

Doe v. Turner, 7 M. & W. 226; Doe v. Price, 9 Bing. 366.

<sup>1</sup> Smith Landl. and Ten. 20-22; Doe v. Watts, 7 T. R. 85.



toria, requires leases to be under seal, except in tenancies where no writing at all is needed.<sup>1</sup> And it is likely that some of our own American local statutes are expressed in language which should be construed to the same effect.

We may observe, further, that terms which are without the Statute of Frauds are not made void thereby, but are allowed to operate simply as estates at will; for which reason the rule of construction has been established that, like other estates at will, they are capable of being turned into tenancies from year to year, by the payment of rent or other circumstances indicating the intention of the parties that they shall be so considered.<sup>2</sup> But in this country, and at the present day, rents are usually payable quarterly or monthly, in which case an estate at will would be terminable at an interval comparatively short.

§ 27. *Form of Lease.*—No particular form of words is necessary to constitute a lease. Coke says that the word *dedi* is sufficient.<sup>3</sup> The old form of words is “demise, grant, lease, and to farm let;” but any language is sufficient which shows that the one intends to dispossess himself of the premises, and the other to enter under him for a determinate time. On the other hand, even though the most proper technical words should be employed, yet if the intention to be gathered from the instrument on the whole were that of a preliminary arrangement for some future lease, such an instrument would be treated in the courts, not as a lease, but as an agreement for a lease.<sup>4</sup> A decision by Lord Kenyon illustrates the latter principle; where formal words of demise were followed by the expression, “I engage to give him a lease,” and the language otherwise indicated that the parties had contemplated executing another instrument at some future time.<sup>5</sup>

<sup>1</sup> 8 & 9 Vict. c. 106, § 103; *Doe v. Moffatt*, 15 Q. B. 257.

<sup>2</sup> *Smith Landl. and Ten.* 22, 65, 66; *Lee v. Smith*, 9 Ex. 662; *Taylor Landl. and Ten.* 8th ed. §§ 56, 58; *Lord Bolton v. Tomlin*, 5 A. & E. 856.

<sup>3</sup> *Co. Lit.* 301 b.

<sup>4</sup> *Bac. Abr. Leases, K*; *Smith*

*Landl. and Ten.* 68, 69; *Taylor ib.* § 159, and cases cited; *Bright. Fed. Dig.*, “Landlord and Tenant,” 544.

<sup>5</sup> *Roe v. Ashburner*, 5 T. R. 163. See *Smith Landl. and Ten.* 70 *et seq.*; *Taylor ib.* 8th ed. § 37 *et seq.*, and cases cited; *Kidd v. Boone*, L. R. 12 Eq. 89.

If it is a present lease, on the other hand, as the instrument purports, parol evidence cannot be admitted to change its force and effect.<sup>1</sup> The lines of demarcation often run together, so as to make it difficult to determine whether an instrument belongs to the one class or the other; and judicial instruction may vary according to the special circumstances; but the principles are well established. The term "grant" includes "demise," or "lease."<sup>2</sup>

Some portions of leases, as they are ordinarily set forth, are essential, others are not. The date of a lease is no part of its substance; and not only are omissions frequently supplied, but the time of delivery may be shown to be, as indeed it frequently is, different from that stated in the instrument.<sup>3</sup> So, too, the courts are liberal, where general errors of description are to be considered, in admitting explanations; for instance, where the names of parties are wrongly spelled or there is a misrecital of some former instrument. But the omission of the lessee's name in the body of the instrument, or any other material error, will vitiate a lease.<sup>4</sup> The premises demised (or let) ought to be accurately described and identified; though not always minutely, for the law requires only that the premises be ascertained with reasonable certainty.<sup>5</sup> And if the tenant enters into possession he cannot object to his covenant liability on the ground of a deficiency of description.<sup>6</sup>

§ 28. *Rent or Recompense under a Lease.*—The periodical return which the tenant makes to his landlord,—or the lessee to the lessor,—by way of compensation for the use of the premises, is familiarly known as the *rent*. This compensation is not always in money; for specific goods may constitute a valuable consideration to support the lease; while, as in the analogous instance of a bailment, no consideration is requisite

<sup>1</sup> Kline v. McLain, 33 W. Va. 32; Shaw v. Farnsworth, 108 Mass. 357; Tiedeman Real Prop. § 179.

<sup>2</sup> Darby v. Callaghan, 16 N. Y. 71.

<sup>3</sup> Taylor Landl. and Ten. § 148; Jackson v. Schoonmaker, 2 Johns. 230; Steele v. Mart, 4 B. & C. 272.

<sup>4</sup> Taylor Landl. and Ten. §§ 150-152; Foot v. Berkley, 1 Vent. 83; Davidson v. Cooper, 11 M. & W. 794; Chauncey v. Arnold, 24 N. Y. 330.

<sup>5</sup> Taylor Landl. and Ten. § 160; Dingman v. Kelly, 7 Ind. 717.

<sup>6</sup> Bulkley v. Devine, 127 Ill. 406.

to make a lease binding upon the parties themselves, if the relation has once taken effect and does not remain executory.<sup>1</sup> At the early common law the tenant frequently rendered military duties by way of recompense, or paid in military supplies; and in agricultural districts a landlord will still take his compensation, not unfrequently, in crops or farm labor.<sup>2</sup> But it is questionable how far such compensation could be deemed rent at all; and certainly rent is usually, and in these days almost universally, made payable in money. Persons wishing to avoid those fluctuations in value which occur through the gradual depreciation of the gold and silver standard have, however, sometimes bargained for compensation in corn, wheat, or some other such staple produce, the practical effect being that the lessee pays in money according to the market value of such produce on each rent day. This mode of payment is much to be commended in long leases, and has been amply justified by the experience of mankind.<sup>3</sup>

Four points are to be especially noted concerning rent at the common law: *First*, that it must always be of something issuing out of the thing demised, and differing from it in nature, and not part of the thing itself; which last would be not a reservation, but an exception.<sup>4</sup> *Second*, that it must be reserved out of something to which the lessor may resort for that technical seizure which the law calls a distress; so that a rent cannot issue out of a right of common, or out of another rent, or in fact out of almost any incorporeal hereditament, however binding the reservation may be as a contract.<sup>5</sup> *Third*,

<sup>1</sup> See 77 Tex. 505; Tiedeman Real Prop. § 192.

<sup>2</sup> Smith Landl. and Ten. 88 *et seq.*; Taylor Landl. and Ten. §§ 14, 24, 152, 370; Fry v. Jones, 2 Rawle, 81; Jackson v. Brownell, 1 Johns. 267; United States v. Gratiot, 14 Pet. 526. See Taylor Landl. and Ten. § 24, and note with citations, on the question whether letting on shares is or is not equivalent to a simple agreement to share crops as tenants in common, rather than a lease which reserves rent as such. And see Herskell v.

Bushnell, 37 Conn. 36; Strain v. Gardner, 61 Wis. 174; Warner v. Abbey, 112 Mass. 355. The better modern opinion follows the intent of the instrument or contract as to leasing and creating a tenancy or otherwise.

<sup>3</sup> See 3 Kent Com. 462.

<sup>4</sup> Co. Lit. 142 a; Doe v. Lock, 2 A. & E. 705; Smith Landl. and Ten. 91.

<sup>5</sup> Smith Landl. and Ten. 91; 5 Co. 8; Bac. Abr. Rent, B. But to this rule are some exceptions. See Smith Landl. and Ten. 91. Distress for rent

that it must be reserved to the lessor himself, and not to a third party.<sup>1</sup> *Fourth*, that the reservation of rent in a lease should be certain; by which is meant that at least the rate can be ascertained and established.<sup>2</sup>

§ 29. **Covenants of a Lease.**—The covenants of a lease next deserve attention, and upon these we shall enlarge somewhat. When we speak of a *covenant*, in the strict legal sense, we refer to that which, in an instrument under seal, corresponds to a promise or agreement in parol undertakings. Of covenants in a lease, some run with the land, while others are only binding upon the person. Some, again, are implied as incidental to the relation of landlord and tenant, while others, on the contrary, must be the subject of express contract in order to be effective. So covenants as affecting one another may be dependent, or they may be independent.<sup>3</sup>

The usual covenants to be found in a lease for any term of years, at the present day, are these: *First*, on the part of the lessor, covenants for quiet enjoyment, against incumbrances, for further assurance, to repair, to renew the lease, and to pay taxes and assessments. *Second*, on the part of the lessee, covenants to repair, to pay rent, to pay taxes and assessments, to insure, not to assign, to reside on the premises, to build after a certain pattern, against carrying on certain trades, for particular modes of cultivation, to redeliver fixtures.<sup>4</sup> These and similar covenants will vary in different cases according to the length of the lease, the nature and situation of the property, and other circumstances; nor, of course, are we to expect that every lease must be found to contain all of these covenants, or that parties, when they see fit, may not make further covenants to suit themselves.

§ 30. **Covenants usual on the Lessor's Part.**—Let us ex-

is disfavored in the United States at this day.

<sup>1</sup> Doe v. Lawrence, 4 Taunt. 43; Oates v. Frith, Hob. 180. But see Jewel's Case, 5 Co. 3, as to whether it would not bind as a contract between lessor and lessee, though bad as to the third party.

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<sup>2</sup> See Co. Lit. 142 a; Maude's n. to Smith Landl. and Ten. 91; Daniel v. Gracie, 6 Q. B. 145.

<sup>3</sup> Taylor Landl. and Ten. § 244 et seq.; Bouvier's Dict. "Covenant;" Smith Landl. and Ten. 96.

<sup>4</sup> See Taylor Landl. and Ten. §§ 219-218, and cases cited.

amine these different kinds of covenants in turn, beginning with covenants on the part of the lessor.

The covenant for quiet enjoyment is implied in every lease, and need not be expressed at all; and if it be broken the landlord must indemnify the tenant against losses resulting from the breach; for the law takes it for granted that every lessor has both the will and the power to keep his lessee in peaceable possession of the premises, and the whole premises. Whenever this covenant is broken, the tenant is at least absolved from paying rent; but if he claims damage he should show it.<sup>1</sup> At the same time, the tenant must do his part, and he cannot expect indemnity unless he has been actually or — what will answer well enough — constructively driven from the premises.<sup>2</sup> The covenant here implied is not against any and all extraneous disturbance of the tenant, but extends only to the acts of the landlord or of those who assert a paramount title.<sup>3</sup>

The implied covenant against or for keeping down incumbrances is for indemnity to the lessee, supposing some one, as a prior mortgagee, should take occasion to enforce his rights under an incumbrance, so as to molest the lessee and disturb his peaceable possession.<sup>4</sup>

The covenant for further assurance, which is really implied in the covenant for quiet enjoyment, binds the lessor expressly to perform and execute all such further reasonable acts and writings as may be needful to complete the transfer of the term; or, in other words, to perfect the lessee's title.<sup>5</sup>

The covenant to repair can never rest upon mere implication; for the common law, with regard to expenses of this

<sup>1</sup> *Larkin v. Misland*, 100 N. Y. 212; *Duncklee v. Webber*, 151 Mass. 408.

<sup>2</sup> *Holder v. Taylor*, Hob. 12; *Hart v. Windsor*, 12 M. & W. 85; *Vernan v. Smith*, 15 N. Y. 332; *Merrill v. Frame*, 4 Taunt. 329; *Smith Landl. and Ten.* 206. As to what will amount to constructive eviction, see earlier and later cases cited in *Taylor Landl. and Ten.* § 308. And see *Bennett v.*

*Atherton*, L. R. 7 Q. B. 316; *Merryman v. Bourne*, 9 Wall. 592; *Duncklee v. Webber*, 151 Mass. 408.

<sup>3</sup> *Tiedeman Real Prop.* § 187.

<sup>4</sup> See *Taylor Landl. and Ten.* §§ 318-322; 4 Kent Com. 74; *Smith Landl. and Ten.* 208; *Hancock v. Caffyn*, 8 Bing. 358.

<sup>5</sup> *Taylor Landl. and Ten.* §§ 323-326, and cases cited; *Middlemore v. Goodale*, Cro. Car. 503.

sort, presumes so strongly against the lessee, that, even though the premises should be burnt to the ground, he must continue, in the absence of an express covenant to the contrary in his lease, to pay rent, and yet have no power to compel his lessor to rebuild.<sup>1</sup> That is to say, the tenant takes the premises for better or worse, and he cannot involve his landlord in expenses for repairs without the latter's express consent.<sup>2</sup> But our written leases at this day generally provide for the abatement or suspension of rent "in case of fire or other unavoidable casualty" rendering the premises unfit for use and habitation, according to the nature and extent of the injuries, and until the premises shall have been put in proper condition once more, with the further alternative of putting an end to the tenancy; and legislation in many of the United States has so far altered the old and harsh rule as to require the landlord to keep his premises in tenantable condition, or else lose his tenant, who, however, may here in the last emergency repair at his landlord's cost.<sup>3</sup> A landlord may expressly covenant to repair, in which case the lessee should notify him when the covenanted repairs become necessary.<sup>4</sup>

The covenant to renew (which is an express, and not an implied covenant where it exists at all) secures to the lessee a decided advantage, since it gives him the option to stay or to leave when his term expires, according to what may then appear to him the more advantageous, while it binds the lessor to renew the lease on the terms stated if the lessee shall desire it. But in order to hold the lessor, this covenant should be definite and precise in its wording; nor are continued renewals much favored, since they tend to perpetuate incumbrances upon land, and are repugnant to sound policy.<sup>5</sup>

<sup>1</sup> Taylor Landl. and Ten. §§ 327-331; Smith *ib.* 199-201; Mumford *v.* Brown, 6 Cow. 475; Sheets *v.* Selden, 7 Wall. 416.

<sup>2</sup> Agreements contemporaneous with the lease, to repair forthwith, should be carried out. Vass *v.* Wales, 129 Mass. 38. Where one leases rooms in a building, the lessor is impliedly bound to keep the rest

of the building repaired so as to protect such rooms. 100 Ill. 214.

<sup>3</sup> See Taylor Landl. and Ten. § 330; 35 N. Y. 269; 54 Ind. 544.

<sup>4</sup> Taylor § 330; Makin *v.* Wilkinson, L. R. 6 Ex. 25; 120 N. Y. 71; Tiedeman § 189.

<sup>5</sup> Taylor Landl. and Ten. §§ 332-340, and cases cited; Furnival *v.* Crew, 3 Atk. 83; 4 Kent Com. 109,

The covenant to pay taxes and assessments will generally be implied as against the lessor, where the lease is silent; though it is usual, and certainly preferable, for the mutual understanding of the parties to be expressed on this point. A tenant, whose lease does not require him to make such payments, may, if compelled by the public authorities, settle the public dues, in order to save a tax sale of the premises, or his eviction, and then set off the payment against his rent.<sup>1</sup>

Such, then, are the usual covenants on the part of the lessor; and, of these, the covenant for quiet enjoyment, the covenant for further assurance, the covenant to repair, and the covenant to renew the lease, all run with the land and bind the reversion.<sup>2</sup>

§ 31. **Covenants usual on the Lessee's Part.** — Of the covenants on the part of the lessee, some correspond to those on the lessor's part which have just been noticed.

The lessee may expressly covenant to keep the premises in repair; and, whether he does or not, the law obliges him to so use the premises that no substantial injury shall be occasioned, unless the lessor has agreed for himself to assume such responsibility. While, however, the lessee is by implication expected to keep the leased premises wind and water tight, and to put on fair and tenantable repairs, he need not make good the ordinary ravages of time; unless, indeed, there be an express covenant in the lease, in which case he must conform to its requirements. It is not uncommon to find covenants inserted in leases which substantially put the outside repairs upon the lessor and the inside repairs upon the lessee. Waste on a tenant's part, whether voluntary or permissive, cannot, of course, be tolerated; and by the very acceptance of his lease, the lessee implies that he will use the premises with reasonable care. Yet good repair is a relative term, and must necessarily vary with the age of the

and cases cited; *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Hyde v. Skinner*, 2 P. Wms. 196. See *Eaton v. Lyon*, 3 Ves. 690.

<sup>1</sup> *Taylor Landl. and Ten.* §§ 341, 342; *Roe v. Hayley*, 12 East, 469.

<sup>2</sup> So does the covenant to pay taxes. 2 Paige, 68; *Tiedeman Real Prop.* § 190. But not any collateral covenant which may be pronounced a personal obligation.

building, the purposes for which it is leased and occupied, and other similar circumstances; nor should fanciful damage be claimed.<sup>1</sup>

The covenant to pay rent is necessarily implied from the very nature and relation of a tenancy for years; yet such a covenant is almost invariably inserted in a lease, notwithstanding the special reservation of rent, besides, in another part of the instrument. Rent is a demand of so very high a nature, that nothing can excuse the tenant from its periodical payment, unless he has been legally compelled to vacate the premises, or the landlord has accepted another person in his stead. Through the unavoidable accidents of fire, flood, and tempest, the premises may become unfit for habitation; yet, as we have already shown, unless the lessor has protected himself by suitable stipulations to the contrary, or a local statute changes the rule of the common law, our courts have no choice but to hold him to a hard bargain, and make him pay his rent all the same.<sup>2</sup> But the implied covenant to pay rent is distinct from that which may have been expressly stipulated in the lease.

Of the covenant to pay taxes and assessments we have already spoken, with reference to the lessor; and it only remains to add that, theoretically, the public treats the tenant as the party primarily liable for such assessments, and the tax or assessment itself as a charge upon the premises in the hands of the occupant, who is expected to claim indemnity from his landlord, deducting the tax from his rent bills. A special covenant in suitable words should be inserted in every lease, where the mutual intention is that the lessee shall pay both rent and taxes.<sup>3</sup>

<sup>1</sup> *Smith Landl. and Ten.* 188-202; *Viner's Abr. Waste*; *Hart v. Windsor*, 12 M. & W. 77; *Taylor Landl. & Ten.* §§ 343-368, and cases cited. See *Makin v. Watkinson*, L. R. 6 Ex. 25; 111 Mass. 531.

<sup>2</sup> *Smith Landl. and Ten.* 96, 125; *Taylor ib.* §§ 369-394; *Holtzapffel v. Baker*, 18 Ves. 115; *Hallett v. Wylie*, 3 Johns. 44; *Belfour v. Weston*, 1 T.

R. 310; *Fowler v. Bott*, 6 Mass. 63. See *Dyer v. Wightman*, 66 Penn. St. 425.

<sup>3</sup> *Taylor Landl. and Ten.* §§ 395-399; *Gabell v. Shevell*, 5 Taunt. 81; *Stubbs v. Parsons*, 3 B. & A. 516; *Smith Landl. and Ten.* 98, 99. See *Hughes v. Young*, 5 Gill & J. 67; *Jeffrey v. Neale*, L. R. 6 C. P. 240. Whether under such a special cove-



§ 32. **Covenants usual on the Lessee's Part; Subject continued.** — The covenant to insure, which is frequently to be found in long leases involving large sums of money, is one of modern creation, and must be express in order to be binding.<sup>1</sup>

The covenant not to assign or underlet is an important one, and especially favored by landlords; since the tenant has a clear right at common law not only to admit subtenants but also to transfer the premises to others for his term, as may suit his own convenience, putting another in his place while in no wise relieving himself of liability to his landlord. But the owner of real estate is rather stubborn in insisting upon the right to choose his own tenants; and hence a well-drawn lease in these days will generally be found to contain an express covenant, upon the lessee's part, not to assign or underlet the premises without the previous written consent of the lessor; a covenant which courts are not disposed to extend very far by construction, as the cases will show.<sup>2</sup> Inasmuch, too, as this covenant not to assign applies only to voluntary, and not to involuntary, assignments, it is not unfrequent for a lessor to guard against the lessee's bankruptcy or insolvency, by still another special covenant that such bankruptcy or insolvency shall forfeit the lease.<sup>3</sup>

Covenants to reside on the premises are rarely met with; nor, under ordinary circumstances, would it be reasonable for

nant, the lessee should be held bound to pay "betterment" taxes, so called, cf. *Love v. Howard*, 6 R. I. 116; *Mayor Re*, 11 Johns. 77; *Pray v. North Lib.*, 31 Penn. St. 69; *Taylor* § 398 note; *contra Simonds v. Turner*, 120 Mass. 188.

<sup>1</sup> *Taylor Landl. and Ten.* §§ 400, 401; *Smith ib.* 100; *Thomas v. Van Kapff*, 6 Gill & J. 372; *Doe v. Peck*, 1 B. & Ad. 428.

<sup>2</sup> *Taylor Landl. and Ten.* §§ 402-413; *Smith ib.* 115-119; *Church v. Brown*, 15 Ves. 265; *Doe v. Carter*, 8 T. R. 61; 4 Kent Com. 130. Whether

a covenant not to assign without the lessor's assent is a "usual covenant," see *Hampshire v. Wickens*, 7 Ch. D. 555. Such covenant being for the benefit of the lessor only, the assignment without consent is not void, but voidable only; nor is a forfeiture worked thereby, unless the lease so expressly provides. *Webster v. Nichols*, 104 Ill. 160; *Eldredge v. Bell*, 64 Iowa, 125.

<sup>3</sup> *Roe v. Galliers*, 2 T. R. 133; *Doe v. Clarke*, 8 East, 185; *Taylor Landl. and Ten.* § 409.

the lessor to exact them.<sup>1</sup> The covenant to build after a certain pattern applies usually to long leases which contemplate some extensive improvement by the lessee.<sup>2</sup> The covenant against carrying on a trade is available for protecting the lessor against certain trades peculiarly offensive, or against business in general. Contracts in restraint of trade are, as a rule, injurious to the interests of the public; and we should not expect to find covenants in leases which obstruct the beneficial use of leased property construed strongly against the lessee; yet landlords may not unreasonably take precautions so as to prevent their elegant dwelling-houses from being turned into workshops, and may insist upon securing their real estate against depreciation in value on their tenants' hands, through some injurious use made of the premises contrary to their wishes.<sup>3</sup>

The covenant for particular modes of cultivation is a characteristic of agricultural leases. Its object is sometimes to enforce the customary mode as to good husbandry, and sometimes to prescribe a special mode, contrary to custom. The lessee of a farm is bound, independently of express covenants, to cultivate the premises in conformity with the reasonable and usual custom of the neighborhood.<sup>4</sup> The covenant to redeliver fixtures in good order at the end of the term affords the lessor an ample remedy in case of loss or injury to such articles affixed to the freehold—for instance, furnaces and ranges—as the lessee may have the right to use while his term lasts, but no longer.<sup>5</sup>

§ 33. *Covenants usual on a Lessee's Part; Subject continued.*—Such, then, are the covenants usual in a lease on

<sup>1</sup> See *Taylor Landl. and Ten.* § 414; *Doe v. Hawke*, 2 East, 481.

<sup>2</sup> *Taylor Landl. and Ten.* § 415; *Mayor v. Brooklyn Fire Ins. Co.*, 41 Barb. 231; *Roper v. Williams*, Turn. & R. 18.

<sup>3</sup> *Smith Landl. and Ten.* 101; *Simons v. Farren*, 1 Bing. N. C. 126; *Doe v. Bird*, 2 A. & E. 161; *Taylor Landl. and Ten.* §§ 416, 418, and cases cited; *Pierce v. Fuller*, 8 Mass. 223; *Chappel*

*v. Brockway*, 21 Wend. 157; *Wadham v. Postmaster-General*, L. R. 6 Q. B. 644.

<sup>4</sup> *Taylor Landl. and Ten.* §§ 420–423; *Roberts v. Barker*, 1 Cr. & M. 808; *Tempest v. Rawling*, 13 East, 18; *Buck v. Pike*, 27 Vt. 529; *Webb v. Plummer*, 2 B. & A. 746.

<sup>5</sup> *Higgins v. Whitney*, 24 Wend. 379; *Perry v. Chandler*, 2 Cush. 237.

the part of the lessee. And it may be added, that the covenants for rent, to repair, to pay taxes and assessments, to reside on the premises, and to cultivate in a certain manner, all run with the land and bind the assignee as well as the lessee himself.<sup>1</sup>

§ 34. **Assignment of Lease ; Act of Parties.**— That privity of estate which exists between landlord and tenant is not confined to the original parties to a lease, but extends to all who may acquire a subsequent interest therein. A contract is or is not assignable; but estates in land may be assigned. The landlord can make over his reversion, or the tenant his term; and assignments of this sort, like all other kinds of assignment, may be brought about either by act of the parties or by act of the law.

An assignment by the landlord is necessarily by deed, since his reversion is an incorporeal hereditament, and, as the phrase goes, lies in grant; and in addition to this, it was formerly requisite, in order to make the assignment perfect, that the tenant should have *attorned*, or in some way recognized the assignee as his new landlord. But this last troublesome formality was dispensed with in England by Stat. 4 Anne, c. 16, § 9, which made the landlord's assignment valid without any attornment on the tenant's part; and yet so far respected the interests of the tenant as to save him from being prejudiced by the payment of any rent to the former landlord before he had received notice of the change. The effect of this statute (whose provisions are commonly adopted in the United States) is to require that notice be given to the tenant before he can be sued by the assignee of his landlord for rent accruing subsequent to the assignment.<sup>2</sup> As to the tenant, he might formerly have assigned his interest by parol;

<sup>1</sup> As to the distinction between such covenants and those which merely bind the person, see further, Taylor Landl. and Ten. § 260 *et seq.*

<sup>2</sup> See Smith Landl. and Ten. 280, 281; Moss v. Gallimore, Dougl. 279; Taylor Landl. and Ten. § 442; Co.

Lit. 309 b; Van Rensselaer v. Read, 26 N. Y. 558; 1 Smith Lead. Cas. 5th Am. ed. 697; Cook v. Guerra, L. R. 7 C. P. 132. The rule of Stat. 4 Anne appears to have been in force previously in some of our States. 15 Mass. 26; 34 Mich. 292; Hansen v. Prince, 45 Mich. 519; 41 Cal. 432.

but the Statute of Frauds now requires all assignments of leases or terms of years to be in writing, and to be signed by the party assigning, or by his agent lawfully authorized for that purpose.<sup>1</sup> And we have just seen that the lessee is frequently restrained still further by a covenant not to assign without his lessor's permission.<sup>2</sup>

The assignee of the lessor has a right to sue the lessee, and *vice versa* the assignee of the lessee can sue the lessor, upon covenants which touch and concern the thing demised,—that is to say, covenants which run with the land,—and upon these alone. This right, so far as concerns assignees of the lessor, is recognized in a statute passed during the reign of Henry VIII.; which statute applied, however, to leases by deed only.<sup>3</sup> As to the lessee and his assignee, the common-law rule was, that while the former might transmit his privity of estate, so that such liabilities would run with the land, he could not transmit the privity of contract, but would remain bound by his own covenants.<sup>4</sup> Nor could the lessor's assignee, at common law, and independently of later statutes, sue or be sued upon the covenants contained in his lease.<sup>5</sup> Where a lease has been assigned, there is, during the continuance of the assignee's interest, a duty on his part towards the lessee to pay the rent and perform all the covenants; but this duty is commensurate with his interest; and he may himself assign over, and so avoid all liability for future breaches of covenant, even though he should assign over to an insolvent person.<sup>6</sup>

§ 35. **Assignment of Lease; Operation of Law.**—But a lease

<sup>1</sup> Stat. 29 Car. II. c. 3, § 3. By Stat. 8 & 9 Vict. c. 106, such assignments are void at law unless made by deed. See Smith Landl. and Ten. 62, 282; Taylor *ib.* §§ 427, 437, and cases cited.

<sup>2</sup> *Supra*, § 32.

<sup>3</sup> See Smith Landl. and Ten. 284, and Maude's *n.*; Taylor *ib.* § 439; Standen *v.* Christmas, 10 Q. B. 135.

<sup>4</sup> Thursby *v.* Plant, 1 Saund. 240; Taylor Landl. and Ten. § 436 *et seq.*, and cases cited.

<sup>5</sup> Co. Lit. 215 *a*; Milnes *v.* Branch, 5 Maule & S. 411. The New York statutes and those of some other States now give an assignee, whether of the reversion or the term, the benefit of any agreement contained in the lease assigned. See Taylor Landl. and Ten. § 441; 1 N. Y. R. S. 747, §§ 23–25.

<sup>6</sup> Smith Landl. and Ten. 294, 295; Taylor *v.* Shum, 1 B. & P. 21; Wolveridge *v.* Steward, 1 Cr. & M. 644; Smith *v.* Peat, 9 Ex. 161; Armstrong

may be assigned by operation of law ; as, for instance, where the lessor or the lessee dies, or where either becomes a bankrupt.

Where a lessor dies, his personal representatives more nearly step into his place as concerns his personal property, than the heir does as concerns his real estate ; for if a man binds himself, his executors are bound, though not named, while this is not so strictly true as respects the heir. Subject to this qualification, we are safe in stating the general rule to be, that the reversion of the lessor is either descendible, and so goes to the heir, who will stand in his ancestor's stead, or it is a chattel and passes to the executor or administrator, who will represent the deceased person.<sup>1</sup> But where the lessee dies, his interest vests in his executors or administrators alone by virtue of their office ; for the term of years is but a chattel, as we stated at the outset, and the heirs, as such, have no immediate concern in the lease. As the personal representative of the deceased lessee, and no more, the executor or administrator may be sued for accrued rents or for past breaches of covenant ; and yet the law does not for this make him liable beyond the amount of assets in his hands. But since the personal representative is regarded as a legal assignee of the lease as well as of the term, he ought to make inquiry as to its value before he assumes to act as an out-and-out lessee ; since otherwise he might find himself in the unpleasant predicament of being held answerable to the lessor for subsequent rents without the corresponding means of payment. Like other assignees, the executor or administrator may (unless restrained by the covenants contained in the lease) assign over, and thus discharge himself from individual liability, so far as concerns all subsequent rent and breaches of covenant ;<sup>2</sup> or he may surrender the

*v. Wheeler*, 9 Cow. 88 ; *Taylor Landl. and Ten.* § 449. See *Moule v. Garrett*, L. R. 5 Ex. 132.

<sup>1</sup> See *Smith Landl. and Ten.* 298, and *Maude n.* ; *Taylor Landl. and Ten.* §§ 459-463 ; *Co. Lit.* 209 *a* ; *Lougher v. Williams*, 2 Lev. 92.

<sup>2</sup> See *Smith Landl. and Ten.* 290-301 ; *Taylor ib.* §§ 459-461 ; *Schoul. Ex'rs & Adm'rs*, §§ 223, 353 ; *Taylor v. Shum*, 1 B. & P. 21 ; *Wollaston v. Hakewill*, 3 M. & Gr. 297 ; *Quain's Appeal*, 22 Penn. St. 510. But see *Van Rensselaer v. Platner*, 2 Johns. Cas. 17.

lease if the lessor accepts.<sup>1</sup> For breach of covenant by the lessor after the lessee's death the latter's representative sues correspondingly.<sup>2</sup>

With regard to the assignee of a bankrupt, the rule is that he may take possession of the leased premises, as part of the assigned estate, and assume full control; but, if he does so, he is expected to bear the burdens as well as to enjoy the benefits of the lease. Here, again, common prudence dictates that the legal representative should make proper inquiries concerning the value of the lease before assuming control; or, having once made himself personally liable, that he should assign over or surrender without delay when he finds the lease unprofitable. Demands under the lease for rent or otherwise, which accrued prior to the lessee's bankruptcy, and remained unsettled, would be payable on the usual principles, from the bankrupt's estate in the hands of the assignee.<sup>3</sup>

§ 36. *Underletting distinguished from Assignment.* — Akin to the subject of the assignment of leases is that of underletting; and we often find that one and the same covenant in a lease provides against either act on the part of the tenant.<sup>4</sup> While the assignment of a lease carries the whole interest in the term, an under-lease reserves to the lessee some portion still of that interest, however small it may be. And the material distinction between the two is this: that while a certain privity of estate subsists between the original lessor and the assignee of a lease, so as to render the latter liable on some of the covenants (as we have already noticed), there is no privity whatever between the original lessor and an under-lessee; for which reason the under-lessee cannot be sued by the original lessor upon any covenant contained in the lease.<sup>5</sup> It may be highly consistent with a lease that the lessee should have a liberal right to underlet, though not to assign.

<sup>1</sup> *Deane v. Caldwell*, 127 Mass. 593; *Morton v. Pinckney*, 8 Bosw. 242.

<sup>2</sup> *Smith v. Dodds*, 45 Ind. 432.

<sup>3</sup> *Smith Landl. and Ten.* 302-306; *Taylor ib.* §§ 456-458, and cases cited; *Turner v. Richardson*, 7 East, 335; *Copeland v. Stephens*, 1 B. & A.

135.

<sup>4</sup> *Supra*, § 32.

<sup>5</sup> *Taylor Landl. and Ten.* §§ 16, 108, 109, and cases cited; *Doe v. Bateman*, 2 B. & A. 168; *Doe v. Byron*, 1 C. B. 623-626; *Davis v. Morris*, 36 N. Y. 569.

§ 37. *Modes of terminating a Tenancy.*—The next topic to be considered is that of determining or putting an end to the tenancy of a term of years. There are five ways in which a lease may be terminated: *first*, by lapse of time; *second*, by merger; *third*, by surrender; *fourth*, by forfeiture; *fifth*, by notice to quit.<sup>1</sup>

§ 38. *The Same Subject; Lapse of Time; Merger; Surrender.*—Lapse of time will, of course, put an end to the tenancy of a term of years. For when I take a lease of premises for a definite length of time, or subject to the happening of a certain contingency, the lease necessarily terminates, on the general principle of a contract, when the definite period has elapsed or the contingency has happened.<sup>2</sup> With the expiration of such a lease the tenant's right of occupation ends, and the landlord may resume possession of the premises at once.

Merger likewise dissolves the relation of landlord and tenant. Of this quaint topic we need only observe that the doctrine of merger applies where two distinct estates meet in the same person, so that the smaller estate becomes merged or drowned in the larger.<sup>3</sup> If I take a lease, and then, before the lease has expired, purchase the premises outright, or inherit them, the lease is at an end; and this through the operation of merger.

But, again, a tenancy for years may be determined by surrender; that is to say, I may give up my lease with the lessor's sufficient permission. A surrender, or yielding up, may be either express or by operation of law. No special form of words is requisite in order to constitute an express surrender, nor is it necessary that the lease should be formally redelivered and cancelled. Anything will suffice which evinces a mutual agreement and assent that the premises be surrendered, followed by an actual yielding up of possession to the landlord. Surrender by operation of law takes place where

<sup>1</sup> Smith Landl. and Ten. 215; Taylor ib. § 464. McElherron, 2 S. & R. 49; Jackson v. Parkhurst, 5 Johns. 128.

<sup>2</sup> Ludford v. Barber, 1 T. R. 86; Ackland v. Lutley, 9 Ad. & E. 879; Ellis v. Paige, 1 Pick. 43; Bedford v. "Merger."

one does an act, such as accepting a new lease, which would be inconsistent with the continuance of the old term.<sup>1</sup> The Statute of Frauds prohibits the surrender of terms of years, or other interests in lands, unless by deed, or note in writing, or by operation of law.<sup>2</sup> But much difficulty is experienced in laying down the precise extent to which the exception "by operation of law" may be carried.<sup>3</sup> Inasmuch as the effect of a surrender is to terminate the relation of landlord and tenant completely, the legal consequence appears to be that a lessee who has underlet and afterwards surrenders to the lessor loses thereupon all right to hold the under-lessee to his covenants, and to collect the rent that may justly have accrued; while the lessor, on his part, cannot, by the act of surrender, destroy the estate which the under-lessee had already acquired in the premises. This inequitable condition of things has been remedied in England and some parts of the United States by appropriate legislation.<sup>4</sup>

§ 39. **The Same Subject; Forfeiture.**— Forfeiture likewise determines a tenancy. It is laid down that a tenant commits a forfeiture if he disclaim and deny his landlord's title; though not where this is by mere word of mouth.<sup>5</sup> The old common law was very strict with respect to forfeiture; more so than courts of the present day would be likely to rule. But, besides this sort of forfeiture, there is another, which occurs whenever some condition has been broken in a lease which reserves to the lessor the right to re-enter thereupon and repossess himself of the premises. Such conditions are rather strictly construed; and it is held that no re-entry can

<sup>1</sup> Co. Lit. 337 b; *Schieffelin v. Carpenter*, 15 Wend. 440; *Challoner v. Davies*, 1 Ld. Raym. 402; *Taylor Landl. and Ten.* § 507 *et seq.*, and cases cited; *Smith ib.* 223-233.

<sup>2</sup> 29 Car. II. c. 3, § 3. See *supra*, § 25.

<sup>3</sup> See *Lyon v. Reed*, 13 M. & W. 285, which comments upon former cases. And see Maude's note to *Smith Landl. and Ten.* 228, where the English cases are fully cited. For the

American decisions, see *Taylor Landl. and Ten.* §§ 510-516, and notes *passim*.

<sup>4</sup> See Stat. 4 Geo. II. c. 28, § 6; *Doe v. Marchetti*, 1 B. & Ad. 715; *Smith Landl. and Ten.* 232, 233; *Taylor ib.* § 518; 1 Rev. Stats. N. Y. 744; 4 Kent Com. 103; 117 Mass. 357.

<sup>5</sup> Bac. Abr. Leases, tit. 2; *Doe v. Wells*, 10 A. & E. 427; *Smith Landl. and Ten.* 233, 234; *Taylor ib.* §§ 488-501.



take place for mere breach of covenant, as in neglecting to pay rent, unless the lease clearly provides for re-entry and forfeiture in such a contingency. And the lessor waives the forfeiture, by accepting rent after any particular breach of covenant, or by other acts evincing an intention on his part to let the lease continue; though it is otherwise where the cause of forfeiture is a continuous one.<sup>1</sup>

§ 40. **The Same Subject; Notice to quit; Modes.** — Lastly, a tenancy is terminated by a notice to quit, given in a regular manner and under suitable circumstances. Notice to quit is necessary to terminate a general tenancy at will, or from year to year, or any other uncertain tenancy not at sufferance;<sup>2</sup> which last species of tenancy arises where one lawfully comes into possession, but holds over wrongfully after his interest has determined.<sup>3</sup> But it does not apply to a lease for years. Thus, if I have a lease for five years, I am not entitled to a notice at the expiration of that period; for I have no right to remain longer, since lapse of time, as has been shown, is enough to put an end to the lease.<sup>4</sup> But if, as frequently may happen, the landlord by some act manifests his consent for me to occupy the premises longer, though no new lease be made out, I shall then become a tenant from year to year, or quarter to quarter, or other appropriate period for paying rent, and must be served with a proper notice to quit before he can bring an action of ejectment against me or otherwise regain possession of the premises. The right of notice to quit is reciprocal, and it can be given by the tenant as well as his landlord.<sup>5</sup> Thus, to continue the illustration, if I, as a tenant from year to year, or shorter rent-paying period, desire to leave, rather than the landlord to have me go, it is my duty to serve a proper notice of intention to quit upon

<sup>1</sup> *Doe v. Woodbridge*, 9 B. & C. 376; *Doe v. Jones*, 5 Ex. 498; *Stuyvesant v. Davis*, 9 Paige, 427; *Taylor Landl. and Ten.* §§ 488-501, and cases cited. See *Toleman v. Portbury*, L. R. 7 Q. B. 344.

<sup>2</sup> *Taylor Landl. and Ten.* §§ 466-487; *Smith ib.* 234-249.

<sup>3</sup> 2 Bl. Com. 150; 4 Kent Com.

116. In some States a tenant at sufferance must be served with a notice to quit, unless he is actually or by implication a trespasser. See *Taylor Landl. and Ten.* §§ 64, 65.

<sup>4</sup> *Supra*, § 38.

<sup>5</sup> *Taylor Landl. and Ten.* § 470; *Hall v. Wadsworth*, 28 Vt. 410.

him before I can relieve myself of the obligations of a tenant.

A notice to quit can, of course, have no effect upon an outstanding lease for years. It need not be given where no tenancy exists or where there is no privity between the parties; nor in case of forfeiture. And it is dispensed with whenever the premises have been regularly surrendered by the tenant, and that surrender accepted by the landlord.<sup>1</sup>

The rule concerning the time when a notice to quit should be given is a very important one, and gives rise to much litigation; but in general, for tenancies not yearly or the modern estates at will, it is that period which intervenes between successive rent days; while for yearly tenancies, which are so common in England, the law requires a notice of at least six calendar months, ending with the period of the year at which the tenancy commenced. The notice to quit may either specify the particular day to quit, or in general language refer to it by the date of the written notice as from a next ensuing rent day to the end of the year, quarter, or month, as the case may be; but the latter form seems preferable, since the exact day when a tenancy expires is still a matter of some legal uncertainty.

In the United States the whole subject of notice to quit is largely controlled by local statutes, which the practising lawyer should very carefully consult when he wishes to know how to advise his client in any particular case.<sup>2</sup> Notices to quit are usually required to be in writing; and while in essentials the notice should be explicit, yet it receives a liberal construction in the courts, provided that in other respects its language be such that the party receiving it could not well misunderstand the meaning.<sup>3</sup> The notice should be given in the name of the landlord or of the tenant himself, as the case may be, or of some agent properly empowered, and it should

<sup>1</sup> Taylor Landl. and Ten. §§ 471, ed.; Kemp v. Derrett, 3 Camp. 473; Smith ib. 221, 235. 511.

<sup>2</sup> Taylor Landl. and Ten. §§ 475-480, and cases cited; Smith ib. 234; Doe v. Keightley, 7 T. R. 63; 4 Kent Com. 113, and notes, latest <sup>3</sup> Smith Landl. and Ten. 238, 239; Taylor ib. § 483; Doe v. Jackson, Doug. 175; Doe v. —, 4 Esp. 185; Currier v. Barker, 2 Gray, 224.

be addressed to the party with whom the privity of contract or estate exists; and the service should be made, if possible, upon that party himself. But this rule has its reasonable limitations; and it is deemed of more importance to show that the party to be warned actually received a notice sufficiently clear, than that formalities were strictly complied with. As regards joint-tenants, the address to both being suitable, the rule is that service upon one will suffice; and in case the tenant is a corporation, notice should be delivered to the proper managing officer or officers.<sup>1</sup> The right to take advantage of a notice to quit—or to follow it up, as one might say—may be waived like any forfeiture; so, indeed, may one notice be considered as superseded by another subsequently given; the law presuming in all such cases that the party meant at first to put an end to the tenancy in accordance with the terms of his notice, and then changed or modified his intention.<sup>2</sup>

§ 41. **Contingent Modes of terminating a Tenancy.**—There are likewise contingent modes by which a tenancy may be determined: as, for instance, where the premises are taken by government for public use; or (in case apartments are leased, and not a whole house, to a certain party) where the building is burned down; or, conformably to expressions in the lease, in case of unavoidable accident rendering the premises uninhabitable; or, finally, where the leased premises are used by the tenant for some immoral purpose,—for in that case the public must interfere even though the landlord do not.<sup>3</sup>

§ 42. **Mutual Rights of Lessor and Lessee; Distress, Ejectment, etc.**—We need not here dwell upon the consideration

<sup>1</sup> Taylor Landl. and Ten. §§ 479-481, 484; Smith ib. 240; Doe v. Woodman, 4 East, 228; Doe v. Goldwin, 2 Ad. & E. 143; Doe v. Watkins, 7 East, 551. See Liddy v. Kennedy, L. R. 5 H. L. 134.

<sup>2</sup> Doe v. Humphreys, 2 East, 237; Doe v. Palmer, 16 East, 53; Goodright v. Cordwent, 6 T. R. 219; Prindle v. Anderson, 19 Wend. 391; Smith

Landl. and Ten. 241; Taylor ib. §§ 485, 486, and cases cited. See Deady v. Nicholl, 4 C. B. n. s. 376; Tailleux v. Wildin, L. R. 3 Ex. 303.

<sup>3</sup> Mill v. Baer's Executors, 24 Wend. 454; Graves v. Berdan, 26 N. Y. 498; Girardy v. Richardson, 1 Esp. 13. And see Taylor Landl. and Ten. §§ 519-522, and cases cited; McMillan v. Solomon, 42 Ala. 356.

of the mutual rights and remedies of lessor and lessee during the continuance of a term for years and consequent upon its determination. These matters belong properly to treatises on the law of real property, and particularly of landlord and tenant. It is sufficient to observe, in passing, that the most interesting common-law remedies of a landlord are those which aid him in getting his rent, where the lessee proves an unworthy tenant; and these are, in particular, the process of *distress* (a most suitable word for a procedure which gave the landlord undue advantage), by which one seizes his tenant's goods and chattels, and applies them in satisfaction of his demands; and that of *ejectment*, by which the landlord is enabled to re-enter upon the premises and turn out a refractory occupant. Public sentiment, in these later years, is directed strongly against the harsh process of distress in American law; the disposition being to place a demand for rent more upon the footing of ordinary debts, and to make an unfortunate man's small household goods exempt from attachment, seizure, and execution, altogether; yet it regards with such favor remedies on the ejectment plan, that we find both English and American local statutes conferring upon landlords the right to a new and summary process for getting rid of obnoxious individuals upon the premises.<sup>1</sup>

As to the tenant, the law gives him suitable remedies for his protection against the forcible and unwarranted intrusion of a landlord, and against the wrongful seizure of his property, at any time during the continuance of the tenancy; and, upon its dissolution, the right of taking away in certain cases the growing crops, or *emblements*, and of carrying off his fixtures.<sup>2</sup>

<sup>1</sup> See Taylor Landl. and Ten. cs. 13, 14, 16; Smith ib. lectures 5, 6, 8.

<sup>2</sup> Taylor Landl. and Ten. cs. 12, 15; Smith ib. lecs. 7, 9. The American practitioner will find John N. Taylor's Landlord and Tenant his most useful and compendious text-book upon this important branch of law, which we have only touched upon so far as seemed pertinent to our present

subject. See also H. G. Wood's Landlord and Tenant, a work of later date. The published lectures of the late John William Smith, of England, on the same topic, are marked by his usual clearness, elegance of style, aptness of illustration, and admirable method; but the work needed his own careful revision to make it all that it should have

§ 43. **Terms of Years in English Sense of Trust Arrangements; Mortgage of Terms.** — We have thus gone over the main points of the law concerning terms for years; meaning, by this, contracts for the possession of land during a specified time, which carry the recompense of rent. But, as we have said, the law also contemplates terms for years in the sense of trust arrangements which merely serve as a species of security for borrowed money. Such terms for years are of little or no consequence in this country; but as they constitute an important feature in the property system of England we may give them a passing notice. The object of such terms being, on the one hand, to enable the security to be realized, as far as possible, and on the other to leave the ownership of the land with the person who borrows, subject to the satisfaction of the debt, the custom is for a long term of years to be created by instrument, say one thousand years, — which, the reader will bear in mind, is at the common law but a chattel, and personal property. This term is vested in trustees, upon trust out of the rents and profits of the premises, or by sale or mortgage for the whole or any part of the term, to raise and pay the money required, as it may become due, and upon trust to permit the owners of the land to receive the residue of the rents and profits. By this means, as Mr. Williams observes, the parties to be paid have ample security for their money; for not only have the trustees the right to receive on their behalf (if they think fit) the whole accruing income of the property, but they may at once dispose of it for one thousand years to come, — or whatever the term's length. On the other hand, the feelings of the owner are consulted. Until the time of payment comes, he may receive the rents and profits by virtue of the trust; and where part of the rents are required for the purposes of the loan, the trustees must pay the residue to the owner. But, should non-payment by the owner render a sale necessary, the trustees will be able to assign the property or any part of it to a purchaser for the term in question without rent. Yet until these meas-

been, even as an elementary outline. Among the more voluminous English works on this branch of law are those of Comyn and Woodfall.

ures have to be enforced, the ownership of the land, subject to the satisfaction of the debt secured, remains as before.<sup>1</sup>

Under such circumstances we find that there is a loan of money made upon collateral security; this security being a chattel interest, namely, a term of years. The trustees, to whom the term has been granted, have an inferior interest in the land, less than a freehold; and all this time the borrower retains the legal seisin, so that he may convey the land, or devise it by will, or it may descend to his heir. But this term remains outstanding; and whenever there is default in paying over the money, the trustees come in and interfere with the beneficial enjoyment of the lands and tenements, whoever may be the nominal owner for the time being. The security must respond for the debt until the debt be cancelled. A certain proviso, known as *cesser*, is, however, generally inserted in such deeds of trust, so that the term may cease as soon as the loan has been paid off, and the objects of the trust are fully accomplished. Hence, though the lease run for a thousand years, there may possibly be a very speedy collapse.<sup>2</sup>

Transactions of this sort, then, constitute a species of mortgage; and it is said that the custom of mortgaging terms of years originated in the doubt once entertained by conveyancers (though now known to be without foundation), whether a mortgage of real estate would not subject the property mortgaged to dower, and the like incidents on the mortgagee's part.<sup>3</sup>

§ 44. **Whether Mortgages are Chattels Real.** — Some, indeed, might be disposed to class all mortgages affecting real estate with chattels real; though not, we think, with propriety. For every mortgage transaction consists of two elements: first, the money debt thereby created, which is plainly a chattel personal; and, second, the security given, which may be

<sup>1</sup> Wms. Real Prop. 7th Eng. ed. 379, 380; Sugd. Vend. and Purch. 13th ed. 508.

<sup>2</sup> Wms. Real Prop. 7th Eng. ed. 379, 380. And see further, *ib.* 380-388, and 4 Kent Com. 86-93, as to

other technical methods of getting rid of such incumbrances, as by a merger in the freehold. And see Stat. 8 & 9 Vict. c. 112.

<sup>3</sup> 2 Bl. Com. 158.

either a chattel personal — as in the case of a mortgage of household furniture, or of a ship — or (as we have just seen) a chattel real ; or real estate, which is no chattel at all. And the doctrine of equity, which regulates real-estate mortgages at the present day, is that the mortgage debt is simply a sum of money loaned upon the security of the land ; that before foreclosure and sale, — which in the great majority of cases need not actually take place at all, — the fee of the land, with the right to enjoy rents and profits, still continues in the borrower or mortgagor ; and hence that the lender has, meanwhile, simply a chattel personal in the debt, and the mortgage note which represents that debt.<sup>1</sup>

But the common law regarded a real-estate mortgage rather as an absolute conveyance of the land, subject to an agreement for reconveyance, on a certain given event, namely, the payment of the money borrowed ; and such, perhaps, is still the usual literal tenor of a mortgage deed. Hence writers were formerly in the habit of classing mortgages with estates in land upon condition ; under which aspect of the law a mortgagee certainly might be thought to have an interest somewhat analogous to a chattel real. And the designation “chattels real” was not ill applied to Welsh mortgages, estates by statute merchant or statute staple, estates by *elegit*, and the like, — all of which have passed into oblivion since Blackstone’s day ; these being regarded as conditional estates in the creditor, for whose benefit the lands were sequestered or withheld from the true owner until a debt should become fully satisfied.<sup>2</sup>

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### CHAPTER III.

#### CHATTELS PERSONAL.

§ 45. **What are Chattels Personal.** — The term “chattels personal” or “personal chattels,” as the reader will gather from what has already been said, applies to what is, strictly

<sup>1</sup> See chapter on Mortgages, *infra*.

<sup>2</sup> See 2 Bl. Com. c. 10.

and properly speaking, movable property, or that property which is capable of being put in motion and taken from place to place. Not only cattle, wagons, household furniture, clothing, jewels, provisions, and such other things of a domestic character as are moved about when a man changes his abode, are chattels personal; but ships, cars, locomotive engines, and the like, which one naturally associates with extensive business operations, and not with the portable convenience of individuals. Money is a chattel personal; and so are those other species of property whose value we so constantly express by reference to the money standard, but which of themselves are only incorporeal rights to be satisfied in money; such as insurance policies, life annuities, legacies, and distributive shares, patent-rights and copyrights, shares in stock companies, bank deposits, and even bills and notes and negotiable instruments generally. All debts and claims to be satisfied in money are, indeed, chattels personal; whether the debt be unsecured, or aided by lien, pledge, or mortgage; and whether the claim arise upon a contract, or be for damages, liquidated or unliquidated, by reason of some injury sustained.

Whatever chattel is not a chattel real is a chattel personal; and hence, to recur to common-law distinctions once more, every species of property which lacks the two characteristics of real estate—to wit, immobility as to place and indeterminate duration as to time—and which is not annexed to real estate, is, and can be, nothing more nor less than a chattel personal.<sup>1</sup>

§ 46. **Significance of the Word "Personal" in this Connection.**—The choice of two reasons for the application of the word "personal" to chattels, in this connection, is given the reader by Coke: "because, for the most part, they belong to the person of a man, or else for that they are to be recovered by personal actions."<sup>2</sup> Blackstone selects of these the former and more natural reason.<sup>3</sup> But Mr. Williams, who has taken pains to examine the doctrine of chattels in its

<sup>1</sup> See §§ 6, 7.

<sup>3</sup> 2 Bl. Com. 16, 384.

<sup>2</sup> Co. Lit. 118 b.



historical development, submits that the latter reason is most probably the true one.<sup>1</sup> Regarding the wants of a philosophical classification as paramount to all antiquarian niceties, we shall prefer to avail ourselves of the choice of reasons afforded by Coke, and to choose the more appropriate. We say, then, that the word "personal" is properly applied to chattels of this description, because of the facility with which they may be carried so as to attend the person of the owner. They are movables, in fine; and were it not for chattels real, which constitute another species of personal property, we might always use the expressions "chattels personal" and "personal property" as synonymous.

§ 47. *Corporeal Chattels first to be considered; next Chattels Incorporeal.* — We now proceed to treat of chattels personal, in the present chapter, under the two leading heads of *corporeal* and *incorporeal*. Such things as one may see or touch — in other words, those which are the objects of the bodily senses — are *corporeal*; and such as cannot be seen or touched, but have only an ideal or abstract existence, — or, as the civilians had it, those which are only *rights*, — are *incorporeal*. It should be borne in mind that the corresponding classes usually made by our common-law writers are those of *choses* (or things) *in possession*, and *choses* (or things) *in action*.<sup>2</sup>

§ 48. *Corporeal Chattels; Animals, Tame and Wild.* — And, *first*, as to those chattels personal which are of a corporeal nature, or things in possession. Among these, animals occupy a prominent place in the affections of mankind, as the subject of property; the word "animal" embracing all beings, not human, which live and move.<sup>3</sup> Animals are movables in a double sense; for not only can they be carried from place to place, but, unlike other chattels, they have the power of voluntary motion, — they can move themselves.

Not only the law of England, but that of nature and of all civilized nations, distinguishes living animals, regarded as the subjects of ownership, into two leading classes: the one

<sup>1</sup> Wms. Pers. Prop. 5th Eng. ed. 2, 3.

<sup>2</sup> See *supra*, c. 1.

<sup>3</sup> See Bouv. Dict. "Animal."

consisting of such animals as are tame, *domitæ*; the other of those which are wild, *feræ naturæ*.<sup>1</sup> To the former class belong what we call domestic animals, like horses, cattle, sheep, and poultry. In animals *domitæ* one may have an absolute property as in ordinary chattels, — that is to say, he may own them absolutely, — just as much as he may the hay, corn, or other fodder which he gives them to eat. For, to use Blackstone's words, they continue perpetually in his possession and occupation, and will not stray from his house and person unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property.<sup>2</sup> Perhaps, however, it would be better to say that, being tame animals, they are not at liberty to stray from the original owner, or to transfer the title in themselves of their own will to others. In animals *feræ naturæ*, or wild animals, on the other hand, whether worth owning, or, like vermin, valueless, one can have no absolute property or right of ownership while they are in the state of nature. They do not remain willingly in any one's possession and occupation, else they would not be wild animals at all. So long as they continue at large, untamed and fierce, they are not the subjects of ownership: they belong to a person only while they are in his actual keeping and under his control; and if at any time they regain their natural liberty, with or without his consent, his dominion instantly ceases, they return to the common stock, and any one has the right to seize and appropriate them afterwards, if, at least, he do so by an act not wrongful.<sup>3</sup> And this is why the civilians have asserted that wild animals are not possessed *per se*, but because of the place which the owner of the estate has provided for them.<sup>4</sup> Yet an animal, once wild, may have changed its habits and become tame; and then the rule of *domitæ* will apply to determine the rights of ownership.

<sup>1</sup> 2 Bl. Com. 390; 2 Kent Com. 348; 2 Burge Col. and For. Laws, 12, 20.

<sup>2</sup> 2 Bl. Com. 390; 2 Mod. 319. A domestic animal is in its owner's possession when in its accustomed range. *Jones v. State*, 3 Tex. App. 398.

<sup>3</sup> 2 Bl. Com. 391-394; 2 Kent Com. 348, 349; *Blades v. Higgs*, 11 H. L. C. 621; *Bouvier's Dict.* "Animal."

<sup>4</sup> Pothier, tit. Choses, part 2, § 1; 2 Burge Col. and For. Laws, 12.

Natural liberty, the reader has perceived, are words applied in this distinction between tame and wild animals. The theory of the law appears to be this: that in a state of nature, all animals have a sort of liberty, which is inconsistent with the condition of being held in servitude and possessed or owned by man; that this natural liberty is, nevertheless, something which man may in any instance lawfully disregard, by bringing the animal into subjection to himself; that when this subjection is merely a forcible one, so that the animal might be considered as compelled to remain and obey against its will, this natural liberty is suppressed and not extinguished, and a man's right of property is qualified, lasting only so long as he can keep the animal under control; but that when the animal, by becoming tame or reclaimed, is considered to have voluntarily surrendered its natural liberty, it thereupon becomes the subject of absolute ownership, and so remains ever after; for its natural liberty is finally extinguished. And the offspring, being born into the state of servitude, and brought up with mankind, are at least presumed to have no natural liberty, and can likewise, if not returning to a wild state, be owned absolutely. The wild animal has some spark of natural liberty; the tame animal has none.

§ 49. *Animals, Tame and Wild; Subject continued.*—It would be found difficult to determine with precision what animals, on general principles, are wild and what are tame. From their long and intimate association with mankind, we pronounce the horse, the dog, the sheep, the ox, and other creatures which are constantly found in and about our homes, to be tame animals; *domestic* animals they are often called. Yet some naturalists assert that even these owe their docility only to the hand of man which tamed them, and that all animals were originally wild;<sup>1</sup> a doctrine consistent with the theory of natural liberty, and one which the Latin term *domitæ* applied to tame animals of itself indicates. Grotius seems to have thought otherwise; for he says that the reason why some creatures fly and avoid us is not the want

<sup>1</sup> See 2 Kent Com. 348, 349, citing Buffon's Natural History.

of gentleness and mildness on their side, but on ours.<sup>1</sup> All that may fairly be affirmed is, after all, that wild creatures exhibit a more intractable, a more rough and stubborn disposition, than the tame.<sup>2</sup> And the common law, wisely avoiding theoretical discussions on this point, refers the question whether an animal is wild or tame, in each case, to our knowledge of its habits and those common in the same species, as derived from human experience and all the circumstances of the case.<sup>3</sup>

In wild animals one may acquire a qualified or special property by occupancy alone; for it is enough to catch and keep, so that the creature cannot escape and regain its natural liberty. Almost all the elementary writers agree, however, that the animal must have been brought within the power of the pursuer before the right of ownership can vest in him.<sup>4</sup> If the animal once becomes deprived of its natural liberty, by the aid of nets or snares or otherwise, and so is brought within the pursuer's power and control, he is constituted its lawful owner, in the qualified or special sense.<sup>5</sup> But it appears that he must have thus far pursued his labor to a successful result. For it has been held in New York that the mere pursuit and being within view of an animal during the chase does not create a right of property as against one who kills and takes it afterwards.<sup>6</sup> Wounding a wild beast so severely that it may be readily captured would seem to give title if the hunter followed up his advantage with reasonable diligence. Yet the civilians differed on this question, and Justinian, it is said, adopted the opinion that the right of property in a wounded wild beast could not attach until the beast was actually taken.<sup>7</sup> While this qualified or special

<sup>1</sup> Grotius Hist. Belg. cited in Puff. Droit Nat. lib. 4, c. 6, § 5.

<sup>2</sup> See Puff. ib. on this subject.

<sup>3</sup> 2 Kent Com. 349; 2 Bl. Com. 391.

<sup>4</sup> See 2 Kent Com. 349; 2 Bl. Com. 391; Pierson v. Post, 3 Caines, 175; Buster v. Newkirk, 20 Johns. 75.

<sup>5</sup> 2 Kent Com. 349; 2 Bl. Com. 391.

<sup>6</sup> Pierson v. Post, 3 Caines, 175;

Buster v. Newkirk, 20 Johns. 75. But the New York legislature have enlarged this right, in certain game laws, so as to give title to one who starts the animal, so long as he continues in fresh pursuit. See 3 Kent Com. 349 n.; Laws N. Y., April 1, 1844, c. 109.

<sup>7</sup> Inst. 2, 1, 13; cited 2 Kent Com. 349.

right of property lasts it is as much under the protection of the law as any other right, and remedies for its invasion are given accordingly.<sup>1</sup> But, as we have shown, animals *feræ naturæ* give the right of ownership to man only so long as they continue in his actual keeping; and if at any time they regain their natural liberty his right instantly ceases.<sup>2</sup> Thus the right which he acquires by force he must maintain by force; he must first catch and then keep. To this rule concerning wild animals an exception is found; namely, where the animal has grown tame and allowed itself to be more thoroughly the property of mankind, submitting voluntarily, so to speak, to the laws of civilized society. Whether this voluntary submission has taken place can only be judged by observing the habits of the creature and those of its kind; and hence is the common-law maxim, that if an animal *feræ naturæ* appears to have, whenever it goes off, the intention of coming back, — *animus revertendi*, — which intention is manifested by habitual return to its master, his right of property is still preserved, notwithstanding the animal goes sometimes astray.<sup>3</sup> Wild animals killed belong absolutely to the killer, supposing his act not wrongful nor done on another's behalf.<sup>4</sup>

Two other instances are given by our elementary writers where animals *feræ naturæ* may be regarded as the subject of a qualified or special property. The first — which might, without violence, be referred to the principles we have already laid down — is said to be in case of their own inability, *ratione impotentiae*; as when hawks, herons, or other birds build in my trees, or coney or other creatures burrow in my land and have young ones there; whereby I gain a qualified property in those young ones till such time as they can fly or run away.<sup>5</sup> The second is *propter privilegium*, or where one has a special privilege of hunting, taking, and killing,

<sup>1</sup> Finch's Law, 176; 2 Kent Com. 348; 2 Bl. Com. 393.

<sup>2</sup> 2 Bl. Com. 392.

<sup>3</sup> 2 Bl. Com. 392; Inst. 2, 1, 15; Finch's Law, 177; 2 Kent Com. 348.

<sup>4</sup> *Blades v. Higgs*, 11 H. L. C. 621.

<sup>5</sup> *Queen v. Shickle*, L. R. 1 C. C. 158.

to the exclusion of others.<sup>1</sup> But special privileges of this latter sort conferred by legislation are hostile to the policy of a free government; though there can be no dispute as to the right of the owner of lands to keep his own privileges or to give to another part of them, upon such consideration as may seem proper; whether it be to shoot his animals or to eat them after they are shot by himself; avoiding, of course, all wanton destruction, so far as may be required by law. And we may add that the common law, differing, perhaps, in this respect from the civil law, insists that one who takes or kills a wild animal on another's land gains no title if a trespasser.<sup>2</sup>

§ 50. *Animals, Tame and Wild; Subject continued.*—Among creatures which are usually classed as wild in species, and yet are frequently found tame, may be mentioned deer, hares, rabbits, pheasants, partridges, and game generally. These are often protected, to some extent, by statute law, for the reason that they are useful to man, as food or otherwise, and their promiscuous and wanton destruction is forbidden. Rooks, however, and other birds which molest rather than benefit society, may be disturbed with more impunity.<sup>3</sup> Doves are classed as animals *feræ naturæ*, and, as such, are not the subjects of larceny except when in the care and custody of the owner; but where they are kept in a dove-cot, though with full opportunity to fly away, a person may be liable to indictment for stealing them.<sup>4</sup> Sportsmanship is an accomplishment which suffers in the progress of social refinement. And young animals, tame and practically in the power and dominion of an owner, may be the subject of larceny, even though liable to become wild later;<sup>5</sup> besides conferring the usual civil rights and responsibilities

<sup>1</sup> See 2 Bl. Com. 394, 395, 419; 12 Mod. 144; *Blades v. Higgs*, 11 H. L. C. 621.

<sup>2</sup> The owner of land has property in game killed thereon by a trespasser. *Blades v. Higgs*, 13 C. B. N. S. 844; 11 H. L. C. 621; *Rigg v. Lonsdale*, 1 Hurl. & N. 923.

<sup>3</sup> See *Hannam v. Sockett*, 2 B. & C. 937-944, per Bailey, J.

<sup>4</sup> *Commonwealth v. Chace*, 9 Pick. 15; *Regina v. Cheafor*, 15 Jur. 1065; 8 E. L. & Eq. 598.

<sup>5</sup> *Queen v. Shickle*, L. R. 1 C. C. 158.

upon the owner;<sup>1</sup> and so with other creatures actually tame and owned for the time being. Yet cases may be found which proceed upon the doctrine that while some animals *feræ naturæ* may be so far subject to the ownership of one person as to give him the usual civil remedies, another is not criminally liable if he molest them, for the reason that they are of too base a nature; and to this category have sometimes been referred sables, ferrets, coons, and the like, which, though sometimes worth money, are judicially pronounced to be unfit for food.<sup>2</sup> Herds of cattle on our remote

<sup>1</sup> See, as to a young buffalo, *Ulery v. Jones*, 81 Ill. 403.

<sup>2</sup> See *Rex v. Brooks*, 4 C. & P. 131; *Norton v. Ladd*, 5 N. H. 203; *Rex v. Searing*, Russ. & Ry. 350; *Warren v. State*, 1 Greene (Iowa), 106; n. to 8 E. L. & Eq. 598. See also 2 Bl. Com. 393. A more satisfactory rule would seem to be to refer cases of this sort to the test of money value, as in other instances of stealing, instead of mere fitness for food. But it is recently held that, an otter being valuable for its fur, the stealing of the animal from its owner is larceny, if it be reclaimed, confined, or dead. *State v. House*, 65 N. C. 315. But in order to sustain a conviction of larceny the animal must have been actually owned when the offender took it. L. R. 1 C. C. 315.

Under the criminal law of some of our States, a dog is not the subject of larceny. *State v. Lymus*, 26 Ohio St. 400; *Ward v. State*, 48 Ala. 161; *State v. Doe*, 79 Ind. 9. Otherwise in many other States. *Harrington v. Miles*, 11 Kan. 480; *Mullaly v. People*, 86 N. Y. 365. The regulation of the keeping of dogs, so as, in the interest of the public, to authorize their summary destruction if wholesome precautions are not followed, is within the police power of the legislature. *Blair v. Forehand*, 100 Mass. 136. See *Heisrodt v. Hackett*, 34 Mich. 283.

There is a fundamental right in

extreme cases, recognized and defined by various local statutes, to destroy animals doing damage to one's own property. *Marshall v. Blackshire*, 44 Iowa, 475; *Aldrich v. Wright*, 53 N. H. 398. And one has a natural right to defend his own domestic animals from external attacks, as where a dog worries sheep. But one should not kill another's animal merely for being on his premises, while doing no damage there. *Brent v. Kimball*, 60 Ill. 211. Where the emergency is not perilous, driving the intruding creature off is the more appropriate course, or else distraining for doing damage. *Hamlin v. Mack*, 33 Mich. 103; 66 Barb. 345. And see general works on Criminal Law. Distress and sale of trespassing animals is provided in some American codes. And see "Estays," vol. 2, *post*. The duty to fence one's premises is sometimes enjoined in this connection.

Action lies against the owner of an animal — *e.g.*, a ferocious dog — for injury inflicted upon one who is free from blame, on proof that the animal was vicious and that the owner knew it. The right to bring such suits, whether because of injury to one's person or property, is also regulated and defined by various modern statutes. A propensity to bite in sport or malice makes no difference. See *Wright v. Pearson*, 4 Q. B. 582; *Worth v. Gilling*, L. R. 2 C. P. 1; L. R. 2 C.

ranches are often branded by the owner, in token of his title, and State codes protect such marks and prosecute those who brand or alter brands unlawfully.<sup>1</sup>

P. 4; *Rider v. White*, 65 N. Y. 54; *Laverone v. Mangianti*, 41 Cal. 138; *Linnehan v. Sampson*, 126 Mass. 506; 52 Vt. 251; *Meibus v. Dodge*, 38 Wis. 6; *East Kingston v. Towle*, 48 N. H. 57; *Congress Spring Co. v. Edgar*, 99 U. S. Supr. 645; *Kightlinger v. Egan*, 75 Ill. 141; *Fallon v. O'Brien*, 12 R. I. 518. In some States the owner's *scienter* or knowledge of vice need not be alleged or proved. *Newton v. Gordon*, 72 Mich. 642. The gist of such cause of action appears to be negligence on the part of the injuring animal's owner, the injured party being free from contributory negligence. And see general works on Torts, Negligence, etc.

In cases of injury of this kind, the fundamental theory of a *scienter* appears to be that dogs (and perhaps cats), living usually in an owner's house, and in companionship with the household, are presumably sufficiently tame and harmless to go at large. But police regulations are found for muzzling dogs at certain seasons of the year and requiring special precautions, which an owner must observe. Whenever an owner knows that his dog is vicious and likely to harm others, if at large, in person or property, he is bound to guard accordingly (as by chain or muzzle) against such danger. And so with the owner of any other domestic animal, horned cattle, horses and the like, which require general or special care according to their known general or special propensities, and are presumably more dangerous than dogs; and an owner's *scienter* becomes always subject to the general *scienter* of mankind as to such creatures. See 37 Fed. 317. Even a horse at large upon the highway is a nuisance. 40 Conn. 113.

*Gt. 125 Ind. 531*. As to a bull, see 75 Mich. 557. Animals known to be dangerous to mankind, finally, ought to be kept from harm with commensurate diligence by an owner, or else the latter will be held to respond for damage done by them to the property or person of third parties; thus an elephant, though "tamed" in a sense, belongs to this class. *Filburn v. Aquarium Co.*, 25 L. R. Q. B. D. 258. So with a wolf kept in a shop. *Manger v. Shipman*, 30 Neb. 352.

Game laws are found, enacted in the public interest, and to preserve the breed of animals not already owned, and worth killing for food, &c.; as in prohibiting killing them during breeding time. See *Phelps v. Racey*, 60 N. Y. 10. Such laws are no unconstitutional invasion of the right of private property. *Ib.* And see *Hart v. State*, 29 Ohio St. 666. So, too, are laws constitutionally enacted for sanitary reasons, as to prevent animals from communicating such diseases as pleuro-pneumonia. *Kenney v. Hannibal R.*, 62 Mo. 476; *Caldwell v. Bridal*, 48 Iowa, 15; 146 N. Y. 44. And to prevent and punish needless abuse or wanton cruelty to animals. See *Swartzbaugh v. People*, 85 Ill. 457; *Commonwealth v. Thornton*, 113 Mass. 457; *State v. Hill*, 79 N. C. 656; *State v. Linde*, 54 Iowa, 139; *Chappell v. State*, 35 Ark. 345; *Rembert v. State*, 56 Miss. 280; *English Acts 12 & 13 Vict. c. 92*; 39 & 40 Vict. c. 77; *Murphy v. Manning*, 2 Ex. D. 307; *Durgan v. Davies*, 2 Q. B. D. 118; 12 Q. B. D. 66. Dis-horning cattle, however skilfully done, is "cruelty." 23 Q. B. D. 203.

<sup>1</sup> See, e.g., Texas code; 13 Tex. App. 215.



Bees, too, are *feræ naturæ*; but when hived they become reclaimed, so as to belong to the person who first hived them. If they afterwards fly away, his right of ownership continues so long as he can keep the swarm in sight, and he can, under such circumstances, pursue and recapture them, even though they should settle upon a tree in another person's lands.<sup>1</sup> But one cannot gain an original title to bees as a trespasser upon some third person's premises.<sup>2</sup>

§ 51. *Offspring of Domestic Animals ; how owned.* — Of tame and domestic animals it is to be observed that the brood belongs to the owner of the dam or mother; the maxim of both civil and common law being, as to brute creatures, *partus sequitur ventrem*. Hence, the owner (or in certain cases the hirer) of the cow is the owner of the calf; the owner of the mare is the owner of the colt; and so on; each proprietor of the female being taken rather than that of the male.<sup>3</sup> And this, not only for the reason which Puffendorf elaborates at some length, that the female parent occasions her proprietor much the greater damage, requiring during the time of pregnancy especial expense in the keeping, while disabled from rendering her usual service; but upon another consideration, quite sufficient in many instances, namely, that the male parent cannot be clearly identified. It is therefore quite a common thing in the case of certain domestic creatures, where the pedigree of the offspring is deemed a matter of importance, for the owner of the sire to demand and receive from the owner of the dam some special compensation in advance by way of equivalent for paternal services. The progeny of cows and of other domestic animals will go presumably to

<sup>1</sup> Goff v. Kilts, 15 Wend. 550. See Gillett v. Mason, 7 Johns. 16; 2 Kent Com. 350; 2 Bl. Com. 393. This was also the rule of the civil law. See 2 Kent Com. 350. Bees in possession of the owner are the subject of larceny. 2 B. & C. 944; State v. Murphy, 8 Blackf. 498. But see Wallis v. Mease, 3 Binn. 546. See also 1 U. S. Dig. "Animals *Feræ Naturæ*."

<sup>2</sup> Rexroth v. Coon, 15 R. I. 35.

<sup>3</sup> 2 Bl. Com. 390; 2 Kent Com. 361; Puff. Droit Nat. lib. 4, c. 7, § 4; Stewart v. Ball, 33 Mo. 164; 130 U. S. 69. Blackstone, however, cites 7 Co. 17, where, under peculiar circumstances, young cygnets were equally divided between the owners of the hen and cock, as an exception to this rule; founded, as he asserts, upon natural reasons, though perhaps it was upon mere custom. See Hanson v. Millett, 55 Me. 184.

the new purchaser notwithstanding no full transfer of possession of premises or animals has been made.<sup>1</sup>

§ 52. **Property in a Person or Corpse.** — Property in a living human being is no longer permitted by English or American law.<sup>2</sup> As to a corpse, no one can in the strict sense of the common law be said to own it; yet there is a *quasi* property in a dead body, more especially for the purposes of interment and protection from insult, which the courts will protect out of regard to the relatives; and the persons having charge of such remains hold them as a trust subject to the regulation of a court of equity, and must act with decency.<sup>3</sup> The last wishes of the deceased person, moreover, as to the interment or disposal of his own corpse, receive often great consideration from his executors and family.<sup>4</sup>

§ 53. **Vegetables, Minerals, etc.; Severance or Annexation.** — Next to animals may be mentioned vegetables, which also, under certain circumstances, come under the designation of chattels personal of a corporeal nature. Vegetables are essentially distinguished from animals in lacking the quality of sensation; though in scientific classification this may not always prove an exact test, so closely are some orders of animals and vegetables allied. We speak of vegetables as chattels when they are disjoined or severed from the ground; and so, too, the fruit of a tree is a chattel when severed from the body of the tree; and the tree or plant itself is a chattel when severed from the ground.<sup>5</sup>

The same may be observed of minerals and metals, like coal, iron, gold or silver, whose substance is part of the realty while in the mine; but after being dug out they are corporeal chattels personal.<sup>6</sup> A similar rule applies to soil dug out to

<sup>1</sup> *Wolcott v. Hamilton*, 61 U. S. 79.

<sup>2</sup> Cf. 2 Bl. Com. 402.

<sup>3</sup> *Pierce v. Swan Point Cemetery*, 10 R. I. 227, and cases cited. When a coffin, with the consent of all persons having any interest in it, has been deposited in the earth, for the purpose of interment, with a corpse enclosed within it, it is no longer a subject of property, nor can replevin

for it be maintained. *Guthrie v. Weaver*, 1 Mo. App. 136. As to cremation of a dead body, see *Williams v. Williams*, 20 Ch. D. 659.

<sup>4</sup> Yet a direction even by will as to the disposition of one's body cannot be enforced. 20 Ch. D. 659.

<sup>5</sup> 2 Bl. Com. 389; 1 Wms. Ex'rs, 6th ed. 668; *Yale v. Seeley*, 15 Vt. 221.

<sup>6</sup> 2 Burge Col. and For. Laws, 10;

be used elsewhere,<sup>1</sup> and to ice formed on a sheet of water, when it is cut away.<sup>2</sup> Coal oil or petroleum is a mineral, too, in its natural state, and being a mineral is part of the realty where it lies confined, like coal, iron, gold or silver, although of a liquid character; and the same may be said of natural gas, and of percolating or subterranean waters.<sup>3</sup> But where the imprisoned gas, water, or oil escapes, it becomes personal property.<sup>4</sup>

Actual severance rightfully made, and with the intention of converting the thing into a chattel, makes what before was realty personal property.<sup>5</sup> But a constructive severance of fruit, vegetables, or trees, or other products, sometimes takes place before there is an actual separation from the land. As where the owner of the fee in lands by a valid deed sells the trees to a third person, or sells the land reserving the trees; the intention being that these trees shall be speedily removed from the land. In such cases it has been held that the trees became chattels personal, and were not, under the Statute of Frauds, to be regarded as interests in land, but might be transferred by parol.<sup>6</sup> And we shall see hereafter that growing crops are for many purposes treated as chattels. Mutual intention, however, to such constructive severance is needful; likewise, that the act be rightful and not wrongful, and with the purpose of passing chattel property; and no constructive severance can operate to prejudice subsequent purchasers for value of the realty without notice.<sup>7</sup>

Bainbridge on Mines and Minerals, 1st Am. ed. 3; Lykens, &c. Co. v. Dock, 62 Penn. St. 232.

<sup>1</sup> Lacustrine Fertilizer Co. v. Lake Guano Co., 82 N. Y. 476.

<sup>2</sup> Higgins v. Kusterer, 41 Mich. 318. Ponds, streams, &c., are usually owned with the soil; but ice may be sold, if formed, whether in or out of the water, as personalty. *Ib.* As to the right to cut ice, see 149 Mass. 322.

<sup>3</sup> Williamson v. Jones, 39 W. Va. 231, 257, and citations; Frank v. Haldeman, 58 Penn. St. 229; 131 Penn. St. 143; 152 Penn. St. 235;

Chasemore v. Richards, 7 H. L. Cas. 349; 15 B. Mon. 479.

<sup>4</sup> *Ib.*; 28 W. Va. 210. See further, § 130, *post*.

<sup>5</sup> § 4.

<sup>6</sup> 1 Ld. Raym. 182; Warren v. Leland, 2 Barb. 613; Kingsley v. Holbrook, 45 N. H. 313, and cases cited. See *n.* to 4 Kent Com. 451, where this question is fully discussed, with references.

<sup>7</sup> Lewis v. Rosler, 16 W. Va. 333. Soil removed from the land of one person and placed on the land of another, without intent of reclaiming

On the other hand, annexation to the soil, or even, as it would appear, a deep embedding in the ground, will change that which before was personal into part of the realty.<sup>1</sup> And hence, in a recent case, where an aerolite weighing over sixty pounds, buried itself in the ground where it fell to the depth of three feet, it was held that it thereupon became the property of the person who owned the soil.<sup>2</sup>

§ 54. **Money a Corporeal Chattel Personal.** — Money is likewise a corporeal chattel personal. This is the common medium of exchange in a civilized nation. At our law the word "money" usually comprehends coins of gold and silver, which have become the recognized standard of value throughout the civilized world. The Constitution of the United States vests in Congress the power to coin money and regulate the value thereof;<sup>3</sup> in pursuance of which laws have been framed from time to time regulating the coinage. Again, the Constitution declares that "no State shall coin money, or make any thing but gold and silver a legal tender in payment of debts."<sup>4</sup> Thus the power to legislate in such matters is checked and controlled in this country by the fundamental law of the land. Civilized nations in general claim the prerogative of regulating each its own coinage, by taking the bullion, or precious metal, in the rough state, dividing it into small portions of convenient size, and marking them with a stamp which attests their value. This is

or removing it, becomes part of the latter person's land. *Lacustrine Fertilizer Co. v. Lake Guano Co.*, 82 N. Y. 476. The owner of land cannot, by agreement between himself and another, without actual severance, make that which is part of the realty personal property as against a subsequent purchaser for value without notice. *Ib.*

Cutting down timber trees did not, at common law, entitle tenant in dower or by the curtesy, &c., to them; nor where a stranger cut them down, nor even though the wind blew them down. 4 Co. 63 a; *Bewick v. Whit-*

field, 3 P. Wms. 268. But as to hedges or trees not timber, a rule somewhat less strict applied. *Com. Dig. Biens, H.*

<sup>1</sup> § 4.

<sup>2</sup> *Goddard v. Winchell*, 86 Iowa, 71. See also *Elwes v. Briggs Gas Co.*, 33 Ch. D. 562, where a like rule of title was applied to a prehistoric boat which was discovered six feet under ground; though the court did not define whether this was real or personal property, but considered the ownership the same in either case.

<sup>3</sup> Art. 1, § 8.

<sup>4</sup> Art. 1, § 10.

what constitutes *coined money*. The usual money of the United States consists of gold and silver coins; and though copper coins and nickel cents are used in making small change, being authorized by statutes to "pass current," they are not constituted a legal tender for the payment of debts.<sup>1</sup>

During a revolutionary period, and in seasons of great financial distress, however, government sometimes puts forth, as a means of temporary relief, notes of a promissory nature, and declares these to be a legal tender for the payment of debts, thereby forcing them into circulation to supply the place of the gold and silver coins which have disappeared, establishing them temporarily as the medium of exchange, and constituting them in effect lawful money.<sup>2</sup> Such notes, if irredeemable, are corporeal chattels personal; and, even though they be redeemable, we should say they were still corporeal rather than incorporeal; though greatly assimilating in general features to bills and notes which are now fully recognized as incorporeal chattels. For whatever circulates as money, whatever we may pronounce to be "cash," appears to be properly treated as a *chose in possession*; that is to say, as a chattel personal of a corporeal character. And even bank-notes are for many purposes treated as money.

§ 55. **Ships and Vessels are Corporeal Chattels Personal.** — Among chattels personal of a corporeal character, no class is more important, in a legal point of view, than that of ships and vessels. But the law of shipping is in many respects peculiar; and while ships and vessels are undoubtedly personal chattels *per se*, and not real estate, yet the rules respecting their title and transfer, together with the registry systems established by legislation in England and America, are such as liken these considerably to lands and tenements.<sup>3</sup>

§ 56. **Miscellaneous Corporeal Chattels Personal.** — There are many other chattels personal of a corporeal character,

<sup>1</sup> See Bouv. Dict. "Money;" Encycl. Am. "Money."

<sup>2</sup> See Bouv. Dict. "Money;" Encycl. Am. "Money." And see chapter,

*post*, on Money, where the subject of legal-tender notes under our Constitution is fully discussed.

<sup>3</sup> *Taggard v. Loring*, 16 Mass. 339;

which give rise to no very peculiar legal doctrines. Among these are to be enumerated household furniture, implements and utensils, garments, plate, jewelry, wares, merchandise, and carriages. The list might be indefinitely extended. Rolling-stock of a railway, such as cars and locomotive engines, are personal chattels of a corporeal character.<sup>1</sup> Ice, when cut and taken from a pond or stream for purposes of merchandise, becomes a chattel personal of the same description.<sup>2</sup> Liquors and imitation butter are chattels personal; though modern legislation in various States may interfere much with the transfer and traffic in these and other things deemed injurious. Whatever personal chattel, in short, you can see or touch is to be classed as corporeal. And such things are what our writers were wont to style *choses in possession*.<sup>3</sup>

§ 57. **Civil-Law Distinctions among Movable Things.** — The civil law distinguished between two sorts of movable things; those animate, or animals, which move themselves, and those inanimate, which required to be moved, and hence were called dead movables. This classification applies in reason to corporeal personal property only.<sup>4</sup> There is another distinction made by the civil law; namely, between things that may be used and kept entire, such as a horse, tables, beds; and things which we cannot use without consuming them, such as fruits, corn, wine, and oil.<sup>5</sup>

§ 58. **Incorporeal Chattels Personal, or Rights in Action, to be considered.** — *Secondly*, as to chattels personal of an incorporeal character, or *choses in action*. Things incorporeal were designated by a word at the Roman law corresponding

Ogle v. Eagle Ins. Co., 4 Mason, 390; 39 La. An. 566; c. 6, *post*, on Fixtures. 1 Pars. Shipping, c. 2. See chapter, *post*, on Ships and Vessels.

<sup>1</sup> But the road-bed, rails fastened in place, and right of way in a railroad, are usually real property. Hart v. Benton-Bellefontaine R., 7 Mo. App. 446, and citation. Otherwise as to rails fastened and a railroad constructed upon the soil of another; for here the rails are movable property. Woodward v. Exposition R.,

<sup>2</sup> See Minnesota Co. v. St. Paul Co., 2 Wall. 645; *supra*, § 53; 1 Washb. Real Prop. 11; State v. Pottmeyer, 33 Ind. 402; Higgins v. Kusterer, 41 Mich. 318. See *post* as to Fixtures.

<sup>3</sup> See 2 Bl. Com. 389; 2 Kent Com. 351; *supra*, c. 1.

<sup>4</sup> Domat Civil Law, by Strahan, 152.

<sup>5</sup> *Ib.*

to our English word "rights." And if our reader keeps the idea before his mind that an incorporeal personal chattel is a sort of "money right," or right in action, he is likely to get all that was worth extracting from the old-fashioned phrase, *choses in action*, upon which we have commented sufficiently in a former chapter.<sup>1</sup>

§ 59. **Debts, Claims, Demands, etc.** — The right to receive the payment in money of what another owes me — or, considered with reference to the party owing, *a debt* — is an incorporeal chattel personal of a very important kind. The word "debt" is used by Blackstone as though applicable only to money due by some certain and express agreement; but in reality it has a broader signification, being properly used to denote all that is due a man under any form of obligation or promise. A debt may be a lien on an estate; or it may be secured by a pledge or pawn; or by a mortgage of other property; or it may be without any lien or security at all.<sup>2</sup>

Money rights in general for which one may bring an action against the person, whether founded on contract, or to recover damages arising from injuries to person, reputation, or property, are to be classed with chattels personal of an incorporeal character, whether properly styled "debts," or (as seems to us preferable) "claims," or "demands."<sup>3</sup>

§ 60. **Debts upon Security.** — We are to suppose that all such debts, claims, or demands, however created, give a right of action against the person obliged or indebted, and also accompany the owner or creditor wherever he goes; so that, on either consideration, they are to be treated as movable property. These qualities being retained, they remain movables, although the indebtedness be secured by land or other immovable property, if that security be accessory only to the debt. Hence a mortgage, though of real estate, repre-

<sup>1</sup> *Supra*, §§ 11-15.

<sup>2</sup> See Bouv. Dict. "Debt;" 3 Bl. Com. 154; chapter, *post*, on Debts.

<sup>3</sup> See 2 Bl. Com. 397, as modified in notes by Chitty, Sharswood, and

others. And see chapter, *post*, on Debts. See Bouv. Dict. "Claim;" "Demand." Gillet v. Fairchild, 4 Denio, 80; Hall v. Robinson, 2 Comst. 293; Wallen v. St. Louis R., 74 Mo. 521.

sents, before foreclosure, security for an incorporeal personal chattel.<sup>1</sup> So, too, is any loan of money on chattel mortgage, or collateral security generally, an incorporeal personal chattel.<sup>2</sup> Arrears of profits and of income, as well as the outstanding loans themselves, are likewise incorporeal.<sup>3</sup>

§ 61. **Bank Deposits considered; General or Special Deposit.**

— The distinction between a corporeal and incorporeal chattel, or between a *chose in possession* and a *chose in action*, may be illustrated by the case of money at a bank. If I deliver money in a package or receptacle properly marked, to a banker, for safe keeping, intending that it shall be returned to me in the same specific condition, this is the deposit of a corporeal chattel, namely, the receptacle with its contents; but if I pay the same money over the counter, on a regular account with the banker, to be subject to my check for a like amount whenever I choose to draw, he owes me a balance, and this balance is a debt, and hence an incorporeal chattel.<sup>4</sup> Banks ordinarily do their business on the latter principle; but we have in these days banks of safe deposit, whose special duty it is to receive moneys, jewels, plate, and other valuables on deposit, to be returned in presumably the same condition as left by the owner. There may be, of course, the special deposit of corporeal chattels, such as plate or jewels; or of muniments of rights, such as notes or bonds; or of both together; but usually the deposit is of the specific package or receptacle with undisturbed contents, which is corporeal.

§ 62. **Various Instances of Incorporeal Chattels Personal.** —

Among instances which are to be referred to the class of incorporeal chattels personal — or, as the courts usually have it, *choses in action* — are the following: contracts for railway shares;<sup>5</sup> an interest in a partnership;<sup>6</sup> a lottery ticket;<sup>7</sup> a claim against a railroad company for the value of goods de-

<sup>1</sup> 2 Powell Mortgages, 781, 782; 2 Burge Col. and For. Laws, 34. See Reg. v. Powell, 2 C. C. R. 403.

<sup>2</sup> See chapters, *post*, on Pawns and Pledges, and on Mortgages.

<sup>3</sup> Wilkinson v. Charlesworth, 11 Jur. 644.

<sup>4</sup> See Carr v. Carr, 1 Mer. 543, n.

<sup>5</sup> Humble v. Mitchell, 11 A. & E. 205.

<sup>6</sup> Tempest v. Kilner, 3 D. & L. 407; 2 C. B. 300.

<sup>7</sup> Jones v. Carter, 8 Q. B. 134.



stroyed while in its custody;<sup>1</sup> public land scrip; a seat at the stock exchange or Brokers' board assignable and having a market value;<sup>2</sup> book accounts and assignable claims and rights to sue generally.<sup>3</sup> Those specified are but scattered instances; for, as Chancellor Kent has said, by far the greatest part of the questions arising in the intercourse of social life, or which are litigated in the courts of justice, are to be referred to this head.<sup>4</sup>

The goodwill of a newspaper establishment is personal property and capable of being valued and sold as such.<sup>5</sup> And so with the goodwill of other business of a chattel character, and valuable personal rights or franchises generally. But it is held that the goodwill of a public house grows out of realty in such a manner that it cannot be considered a personal goodwill.<sup>6</sup>

§ 63. **Legacies and Distributive Shares.** — To the same class of incorporeal chattels personal belong legacies and distributive shares. These are sometimes placed among "*equitable choses in action*," or rights to be enforced by suit in equity; since the rule formerly was, that if the executor withheld payment, the legatee could maintain no action at law, but had to sue in equity.<sup>7</sup> But the English statutes have modified that rule, while in some of the United States an action at law for a pecuniary legacy has been maintained, and in some it is expressly given by statute.<sup>8</sup> By the term "legacy" we mean a gift of personal property under a last will and testament. By a "distributive share" we mean that share of the residue of the personal estate, after payment of all debts and

<sup>1</sup> *Ayres v. Western R. R. Co.*, 48 Barb. 132.

<sup>2</sup> *Powell v. Waldron*, 89 N. Y. 328.

<sup>3</sup> 148 Ill. 259; 57 Tex. 156; 20 Blatchf. 417.

<sup>4</sup> 2 Kent Com. 351.

<sup>5</sup> *Boon v. Moss*, 70 N. Y. 465.

<sup>6</sup> *Kitchin, in re*, 16 Ch. D. 226. In Texas a "head-right" or unlocated land certificate is in the nature of a chattel personal. *Johnson v. Newman*, 43 Tex. 628; 60 Tex. 220.

<sup>7</sup> See Wms. Pers. Prop. 3d Am. ed. 6; *Deeks v. Strutt*, 5 T. R. 690; *Braithwaite v. Skinner*, 5 M. & W. 313.

<sup>8</sup> See Stats. 9 & 10 Vict. c. 95, §§ 58, 65, and later statutes cited in Wms. Pers. Prop. ib., and see Wetherell's Am. note to ib.; *Beeker v. Beeker*, 7 Johns. 99; *Farwell v. Jacobs*, 4 Mass. 634; *Morrow v. Brenizet*, 2 Rawle, 185; *Wooten v. Howard*, 2 Sm. & M. 527.

charges, to which a person is entitled under the statutes of distribution, relative to the estates of persons dying intestate.<sup>1</sup>

§ 64. **Patent-Rights and Copyrights.**— Patent-rights and copyrights are species of incorporeal personal chattels. The Constitution of the United States confers upon Congress the power to pass laws “to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.”<sup>2</sup>

The limited monopoly conferred by patent and copyright laws has been so long a feature of English and American jurisprudence as to make it questionable what are the natural rights of an inventor or author. In either case free dedication to the public of the creation of one’s brain debars him from asserting an exclusive claim subsequently, however valuable it might be.<sup>3</sup> As to literary property, for instance, the sole proprietorship of a manuscript is in the author, or his assigns, before publication; but an unqualified publication, such as one makes by printing and offering copies for sale, dedicates the contents to the public, unless the sole right of printing, reprinting, publishing, and vending the work is secured by copyright.<sup>4</sup> Books that are printed or machines that are made, embodying one’s ideas, are themselves corporeal chattels of course. Every private letter belongs so far to the author of them as against the receiver, that the latter cannot publish or sell them without the former’s consent;<sup>5</sup> thus the ownership of ideas not fully imparted finds much protection aside from statute.<sup>6</sup>

But one who has ideas, trade secrets, or systems of his own which cannot be used or sold without disclosure, must guard

<sup>1</sup> See *post*, chapter on Legacies and Distributive Shares.

<sup>2</sup> U. S. Const. art. 2, § 8, cl. 9. See *post*, chapter on Patents and Copyrights; Wms. Pers. Prop. 5th Eng. ed. 6.

<sup>3</sup> See chapter on Patents and Copyrights, *post*.

<sup>4</sup> *Parton v. Prang*, 3 Cliff. 537.

<sup>5</sup> 2 Story, 100; *Rice v. Williams*, 32 Fed. 437, and cases cited.

<sup>6</sup> The inventor of a machine who sells it without a patent, may still have exclusive ownership of the patterns, where simple measurement of the machine does not give it. *Tabor v. Hoffman*, 118 N. Y. 30.

his own property, if he has no patent or copyright to protect him; for if he discloses the idea or secret to another even in confidence, without contract to guard it or an agreement for recompense, such a party is entitled to use it for his own benefit without rewarding him.<sup>1</sup> It is otherwise, however, where the other party obtains knowledge by some fraud or breach of trust or of contract, for to this extent the owner of the original idea or secret is protected.<sup>2</sup>

§ 65. **Insurance Policies.** — Debts arising under contracts to insure, effected by means of what are called policies of insurance, are in the nature of debts payable on contingencies; and these are to be classed among incorporeal chattels personal. Insurance may be defined as a contract, by which, in consideration of a certain sum, one party agrees to indemnify another against risks incurred in a certain manner, during a specified period. The usual kinds of insurance are, — *first*, insurance on lives; *second*, insurance against loss by fire; *third*, marine insurance, or insurance on risks incurred in navigation; and there are other kinds, such as accident and fidelity insurance.<sup>3</sup>

§ 66. **Annuities, Pensions, Salaries, etc.** — Personal annuities, or annual payments of money, not charged on real estate, are likewise a species of incorporeal personal chattel. The law of personal annuities is so closely allied to that of life insurance, at the present day, that it is difficult to separate them in legal principle. Pensions, or those stated money allowances which government grants to an individual, or his representatives, in consideration of valuable public services rendered by him to the country; also salaries (a term usually applied to the recompense paid a public officer for the performance of his public duties); these are all to be classed under the same general head, being “money rights” of an incorporeal character.<sup>4</sup>

<sup>1</sup> *Morison v. Moat*, 9 Hare, 241, 263; *Bristol v. Equitable Society*, 132 N. Y. 264; *Chadwick v. Covell*, 151 Mass. 190.

<sup>2</sup> *Ib.*

<sup>3</sup> See Bouv. Dict. “Insurance;” Wms. Pers. Prop. 5th Eng. ed. 159; chapter *post*, on the various kinds of Insurance.

<sup>4</sup> See Bouv. Dict. “Annuity;”

§ 67. **Incorporeal Personal Chattel; Right to be distinguished from Evidence of Right.** — We are already getting beyond the term *chose in action* or the “right-to-sue” theory, and coming upon the more truly debatable ground of incorporeal personal property. Let us, then, take care not to confound our “money right” or right of action to obtain money, with the instrument which evinces the possession of that right. Thus the right to recover money under a contract, the debt, claim, or demand, is one thing; but the contract itself is another, and evidence, rather, of the right. One may have a pension claim, though not a pension certificate. A patent-right may exist before the letters-patent are issued. And while there may be a debt due under an insurance policy, this is to be distinguished from the insurance policy or contract itself. To preserve such distinctions is not always easy, especially where the right and the instrument are closely blended in legal consideration, as in these last instances; and one finds himself strongly tempted to consider patent and insurance rights as corporeal property, mistaking the instrument — the letters-patent, or the insurance policy — which may be seen and touched, for the right which is and must be invisible and intangible.

§ 68. **Stocks and Shares.** — The necessity of the distinction becomes more apparent when we come to consider the subject of stock, upon whose nature the courts to-day speak somewhat doubtfully. Said Lord Chief Baron Richards, of England, in *King v. Capper*,<sup>1</sup> in the year 1817: “Now it is certainly not easy to define precisely the meaning of ‘stock.’ It is not an ancient subject of property nor known to the common law. It is, however, a hereditament.” And further he adds that stock is to be considered “a *chose in action*, or in the nature of a *chose in action*. It is not a thing tangible of which you can take corporeal possession.”<sup>2</sup> And Chief Justice Shaw, of Massachusetts, observed later of bank shares, which are a species of stock: “If a

“Pensions;” “Salary;” Wms. Pera. Prop. 5th Eng. ed. 180. See chapter *post*, as to Annuities, &c.

<sup>1</sup> 5 Price, 217, 262. And see *Wildman v. Wildman*, 9 Ves. 177.

<sup>2</sup> *King v. Capper*, *ib.*

share in a bank is not a *chose in action*, it is in the nature of a *chose in action*, and, what is more to the purpose, it is personal property."<sup>1</sup> Again, in a later Pennsylvania case the same question will be found fully discussed by Judge Rogers, who, after referring to what Kent<sup>2</sup> has included under the title of "things in action," proceeds to say that "bank shares would seem to be included in that class, as they merely entitle the holder to receive on demand a proportion of the profits or earnings of the bank, and never in this country have been considered other than chattels."<sup>3</sup> And Judge Comstock, of New York, considers that certificates of stock are not securities for money in any sense, much less negotiable securities; that they are simply the muniments and evidence of the holder's title to a given share in the property and franchises, of which he is a member.<sup>4</sup> The reader will thus perceive that the courts are rapidly outgrowing this *chose in action* doctrine, now that new and peculiar kinds of personal property have lately come into use; while they intimate plainly enough, what we undertake to assert, that shares in stock, notwithstanding the visible and tangible certificates which are sold in the market, and represent them, constitute a sort of "money right," and are an incorporeal, not corporeal, species of property. The dividend of the stock is incorporeal as well as the stock itself.<sup>5</sup> In England, shares in companies acting exclusively on land, as canal and turnpike companies, were at first sometimes treated as real estate; but in the great majority of cases, and in all the modern charters and acts of incorporation, shares in joint-stock corporations are made

<sup>1</sup> *Hutchins v. State Bank*, 12 Met. 421.

<sup>2</sup> 2 Kent Com. 351. The statement of Chancellor Kent in question should be qualified, considering the later developments of the law of personal property.

<sup>3</sup> *Slaymaker v. Gettysburg Bank*, 10 Penn. St. 373. And see further, *Union Bank of Tennessee v. State*, 9 Yerg. 490. In the text of Angell and

Ames on Corp. § 560, there is an inaccurate use of the word "chattels." The writer says: "Shares in joint-stock companies are not, strictly speaking, chattels;" but the context shows that he meant only *corporeal* chattels.

<sup>4</sup> *Mechanics' Bank v. New York R. R. Co.*, 3 Kern. 627.

<sup>5</sup> *Slaymaker v. Gettysburg Bank*, 10 Penn. St. 373.

in that country, what they have been almost universally regarded in the United States, personal property, or chattels. This, of course, is a matter regulated by general or special legislation, since corporations which issue stock are the creature of statute or charter.<sup>1</sup>

One especial difficulty, in regarding the nature of stock, arises from the fact that stock certificates express some certain money value on their face. Unlike letters-patent, which represent an uncertain value, and insurance policies, where the liability indicated is purely contingent or remote, certificates of stock are the evidence of a definite fraction of a definite and existing debt; and if the corporation issuing these certificates be well conducted, the certificates will have a market value so precise as might readily mislead one into the belief, in recent days of paper money, that they are themselves money or securities for money; though the par value and market or actual value of the shares may be by no means synonymous.

§ 69. *Bills and Notes, Checks, etc.* — Now let us look a little further into this subject of incorporeal chattels personal. Every "money right" is a money right only while the obligation to pay lasts. But if a debt be paid in money (the legal tender for debts), this debt is extinguished, and the creditor has no longer an incorporeal chattel personal of the nature of a money right, but, in its stead, a corporeal chattel personal; that is, the money which was paid in satisfaction. And so with any claim or demand. And so long as the right of action to recover a debt, claim, or demand which the law gives a person is without visible or tangible instrument, by way of evidence of its amount, we find no difficulty in calling the debt, claim, or demand, an incorporeal chattel. But it is otherwise when some written certificate, which acknowledges an indebtedness, floats about seeking purchasers in the money market. Thus, if A. owes me a thousand dollars, I have in the money right an incorporeal

<sup>1</sup> See Wms. Pers. Prop. 6, 199; 2 Stock; 11 Phila. 609; Tregear v. Kent Com. 340 n.; *post*, chapter on Water Co., 76 Cal. 537.

chattel personal. If he pays me in money one thousand dollars, the incorporeal chattel is gone, and I have a corporeal personal chattel — namely, one thousand dollars cash — in its place. But supposing A. makes out his note for one thousand dollars, payable on demand instead, and hands it to me, what kind of a chattel is this note? His mercantile standing may be so good that I could hand the note to a third person and receive one thousand dollars upon it; and I may regard it as in every respect the equivalent of money. But it is not money. The instrument is but evidence of an indebtedness which A. must eventually pay off, as in the other case, in money. The note may be visible and tangible; but the money right which it represents still continues incorporeal as before.

Being misled by the negotiable quality of bills and promissory notes, whereby they passed current very much like money, the courts were formerly inclined to treat them as *choses in possession*, or corporeal property; but the later authorities more correctly hold that they are “in the nature of *choses in action*,” which means, that they are incorporeal chattels personal.<sup>1</sup> Bank checks are properly referred to the same class.<sup>2</sup>

§ 70. **Bonds and Other Instruments for the Payment of Money.** — Individual bonds for the payment of money, with or without security, have long been known in our law. Government and corporation loans furthermore have become an important subject for investment in these latter days; and not only does the federal or State government issue its bonds or certificates of debt bearing interest, to tempt the capitalist, but similar issues are frequently authorized by law in the case of public and private corporations. Thus, there are county and city bonds, railroad bonds, State bonds, and United States bonds, all offering good rates of interest, to be

<sup>1</sup> *Gaters v. Maddeley*, 6 M. & W. 423; *Nash v. Nash*, 2 Madd. 133; *Richards v. Richards*, 2 B. & Ad. 447; *Scarpellini v. Acheson*, 7 Q. B. 864; *Phelps v. Phelps*, 20 Pick.

558. See *post*, chapter on Bills and Notes.

<sup>2</sup> See 1 Pars. Bills and Notes, 87, and cases cited; Wms. Pers. Prop. 5th Eng. ed. 5, 79.

purchased in the open stock markets at this day. Some of the bonds offered are of a negotiable character, and are put forth as coupon bonds ; some are to be registered ; some are bonds accompanied by mortgage securities. Indeed, private individuals in many of the United States, who wish to borrow on mortgage of their lands, do so, by giving with the mortgage their coupon bond, as a matter of convenience to the lender, although the usual practice in the older States appears rather to issue a promissory note for the loan instead, which note is secured by the mortgage. Bond and mortgage securities without coupons have long been known. Some of our present government loans are nothing more than promissory notes bearing interest ; others have the character of bonds.

The national debt of England is composed of several separate stocks, of which the most important is called the "consols," and a general designation is that of "stock in the public funds." We use the terms in this country, "government" or "public securities," in general ; and special loans were popularly designated recently as the United States "seven-thirties," "five-twenties," and the like, according to some peculiar characteristics, of which we shall speak elsewhere. There are "Massachusetts" or "Ohio State bonds" and so on. As to what are more properly corporation bonds, appropriate names are used in the stock market ; such as "Chicago City" bonds, or "Union Pacific Railroad" bonds ; and the like. From what has been already said, it is evident that all loans on securities of this sort are incorporeal chattels personal. Perhaps in the case of public securities of the United States, difficulty would be sometimes found in drawing the line between corporeal and incorporeal ; but we apprehend that while notes issued by legislative authority in pursuance of the Constitution, for circulation as currency and as a legal tender for the payment of debts, should be classed with gold and silver money as corporeal, others which were put forth to invite investment merely, being evidence of a debt to be paid thereafter, like the promissory note of an individual, ought to be regarded



as incorporeal. This subject has not as yet received great attention in the courts.<sup>1</sup>

## CHAPTER IV.

### PERSONAL CHATTELS CORPOREAL AND INCORPOREAL CONTRASTED.

§ 71. **Leading Distinctions between Corporeal and Incorporeal Chattels Personal.**—Having classified the various kinds of chattels personal under their appropriate headings of *corporeal* and *incorporeal*, let us now proceed to point out some of the leading distinctions which the law has applied to the two classes; or, if the reader prefers to call it so, as between *choses in possession* and *choses in action*.

§ 72. **As to Assignment and Transfer; Early Doctrine.**—Perhaps the most important distinction concerns the assignment or transfer of such chattels. Corporeal chattels personal might always be assigned and transferred by mere delivery of possession with appropriate intention.<sup>2</sup> But as to those incorporeal, the old common-law rule was, that no assignment or transfer could be made; and of course corporeal delivery was impracticable. We are still to bear in mind that incorporeal chattels personal, as such, were not known in the early days; but that *choses in action*, or, at most, the right to sue to recover some debt, claim, or demand, in the courts, were all which our ancestors regarded in applying their rule of prohibition. To permit a transfer of such a right was thought to encourage litigation, while the very attempt to transfer was looked upon with abhorrence as involving the guilt of *maintenance*, or maintaining a stranger in his private suit. These were, indeed, the days of primi-

<sup>1</sup> See Wms. Pers. Prop. 5th Eng. ed. 6, 181; Craig v. Missouri, 4 Pet. 410; Thomson v. Lee County, 3 Wall. 327; chapters, *post*, on Money, Public Securities, Bonds, &c. And see Attorney-General v. Jones, 1 Mac. & G. 574, 585.  
<sup>2</sup> See Wms. Pers. Prop. 5th Eng. ed. 32 *et seq.*; 2 Bl. Com. 441.

tive simplicity; and such a state of things could not last long. With the revival of trade, bills of exchange became introduced into the mercantile community of England. These, by the custom of merchants, were rendered negotiable; that is, they could be legally assigned or transferred by simple indorsement or delivery; and in the reign of Queen Anne promissory notes were made assignable by indorsement and delivery in the same manner; so that if a debtor could be induced to give his bill or note for what he owed, his creditor might pass the debt over to a third person, and practically set the old policy of the law at defiance. Bills and notes therefore grew into favor very rapidly. Meantime an indirect method of assigning money rights was discovered; for in the reign of Henry VII. it was determined that a person might assign over a debt secured by bond, by way of adjusting his own liabilities with a third person, though not for maintenance, and thus empower the assignee to sue in the assignor's name at his own cost; which principle has since become commonly applied to *choses in action* generally.<sup>1</sup> It has even come about that an instrument which is not a negotiable bill or note, but was intended as such, may, if valid, be proved and assigned as a contract or money right; though primarily perhaps as an equitable rule and of course subject to equities against the assignor from which negotiable instruments are free.<sup>2</sup>

§ 73. **Assignment; The Subject continued; Old Rule of Law.**

— The legal assignment of a debt is now usually made by an instrument in the nature of an assignment, coupled with a power of attorney, which confers authority from the creditor to his assignee to sue the debtor in the creditor's name; and it is better to have such assignment by deed, or at all events,

<sup>1</sup> See Wms. Pers. Prop. 5th Eng. ed. 5, 6, 111; 10 Co. Rep. 48 a; Bro. Abr. Chose in Action, pl. 3, 15 Hen. VII. 2; Bouvier's Dict. "Chose in Action;" Bac. Abr. Assignment; Welch v. Mandeville, 1 Wheat. 236, per Story, J.; Pitts v. Holmes, 10 Cush. 93; Bartlett v. Pearson, 29

Me. 9; Webb v. Steele, 13 N. H. 230; Blin v. Pierce, 20 Vt. 25. Local American statutes confirm quite generally the right to sue on *choses in action*, and regulate this whole subject.

<sup>2</sup> First Nat. Bank v. Carson, 60 Mich. 432; § 76.

by writing of some kind; though a power of attorney of this sort may be conferred by parol.<sup>1</sup> The transfer of debts or money rights by means of an assignment with power is recognized and protected in the courts of law. As a power of attorney is legally revoked by the death of the person giving it, the question might be asked whether such powers are available to the assignees of creditors under such circumstances; but the general rule as to powers of attorney is qualified by this exception, that if a power be coupled with an interest, it survives the person giving it, and may be executed after his death. Hence, if a power of attorney be given on an assignment of a debt for a valuable consideration, it is generally made irrevocable in terms, and is certainly deemed irrevocable at law.<sup>2</sup> But a power of attorney, though irrevocable during the life of the party giving it, may yet become extinct by his death.<sup>3</sup>

The principle which forbade the assignment at law of a debt is at the foundation of the law of contracts. For, as a general rule, a contract is not legally assignable. The instrument of contract (if there be any) passes, it is true, to the transferee, so that he can sue to recover the document; for the instrument considered by itself is a corporeal thing, and might perhaps be valuable because it bore a distinguished person's autograph, or for other special reasons; but the rights under a contract cannot be legally transferred at the old common law so as to put the assignee in the place of the assignor, and entitle him to sue in his own name. At best, he can only sue in the name of the original party who assigned the contract, and he is regarded rather as attorney than an out-and-out assignee.<sup>4</sup>

§ 74. Assignment; The Subject continued; Rule of Equity.—

<sup>1</sup> Wms. Pers. Prop. 5th Eng. ed. 111, 112; Heath v. Hall, 4 Taunt. 326; Howell v. McIvers, 4 T. R. 690. See Greenby v. Wilcocks, 2 Johns. 1; Welch v. Mandeville, 1 Wheat. 236.

<sup>2</sup> Hunt v. Rousmanier, 8 Wheat. 174; ib. 1 Pet. 1. See Michigan Ins.

Co. v. Leavenworth, 30 Vt. 11; Saltmarsh v. Smith, 32 Ala. 404; Walsh v. Whitcomb, 2 Esp. 565.

<sup>3</sup> Hunt v. Rousmanier, 8 Wheat. 174.

<sup>4</sup> Smith Contr. 247, 248; Chitty Contr. 131-133 and notes; 1 Pars. Contr. 223-228; Story Eq. Jur. § 1056.

Now, in equity, from an early period, the courts viewed the assignment of a *chose in action* quite differently. Courts of equity, dealing with a great variety of rights, prospective interests, whether in real or personal estate, contingent gains, such as freight to be earned on a cargo to be procured, expectancies of heirs to their ancestor's estate, trusts and debts, claims and demands generally, were wont to treat all assignments of incorporeal things, so far as concerned their own jurisdiction, as amounting to nothing more nor less than an agreement to permit the assignee to make use of the name of the assignor at law for the purpose of recovery; or as a contract which entitled the assignee to sue in equity in his own name, and to enforce payment of the debt directly against the debtor, whether the latter had assented to the assignment or not; making the debtor, as well as the assignor, if need be, a party to the bill.<sup>1</sup> And as to things which had no actual or potential existence, but rested in mere possibility, equity would in a fair case support an assignment, not as a positive transfer operative *in presenti*, but as a present contract to take effect and attach as soon as the thing should come *in esse*.<sup>2</sup>

<sup>1</sup> See Story Eq. Jur. §§ 1040, 1043, 1055, 1057, and cases cited; Smith Man. of Equity, 9th Eng. ed. 244 *et seq.*; Wms. Pers. Prop. 5th Eng. ed. 112.

<sup>2</sup> Story Eq. Jur. § 1040; Calkins v. Lockwood, 17 Conn. 154; Langton v. Horton, 1 Hare, 549; The Wasp, L. R. 1 Ad. & Ec. 367. A contingent remainder may be assigned in equity, though not at law. 110 N. C. 6.

As to wages or earnings, while one may assign whatever he may earn hereafter under an existing and specific employment, it is held (particularly under the common law aspect) that he cannot assign future earnings where not actually engaged nor under contract, as out of some mere possibility of becoming employed. Mulhall v. Quinn, 1 Gray, 105; Jermyn

v. Moffitt, 75 Penn. St. 399; Wade v. Bessey, 76 Me. 413. But this seems a narrow doctrine from the equitable standpoint; and hence an assignment of wages reasonably expected to be earned in the future in a specified employment, and not a mere indefinite expectation of earning money, is held valid in equity at all events, though founded upon no existing employment or contract. Edwards v. Peterson, 80 Me. 367; Metcalf v. Kincaid, 87 Iowa, 443.

Claims for services already rendered may, with their lien incidents, be readily assigned in any case. But one who agrees to perform personal services requiring skill or peculiar qualifications cannot, without the assent of the other contracting party, so assign over his executory contract to perform as to substitute another

But equity recognizes just limits to this doctrine, by its refusal to enforce such assignments as are against public policy. Assignments of future pay by officers of the government, whether in the civil, military, or naval service, have been discountenanced on this ground; although as to back pay, prize-money, and arrears of pension, it has been frequently decided otherwise.<sup>1</sup> Legislation sometimes interposes to protect soldiers and others against assignments of this nature. And the assignment of a government claim is in general void under an act of Congress.<sup>2</sup> So, too, on principles of public policy, equity will not uphold assignments which involve champerty or maintenance, nor where, in general, litigation would be thereby encouraged on a mere speculation. But, in this matter of money rights, equity deals more liberally than the law; and while the assignment of a mere naked right to litigate,—such as the right to set aside a conveyance for fraud,—which is incapable of giving any benefit except through the medium of a suit, would not be enforced by courts of equity, because against public policy; yet they permit a person to take an assignment of the whole interest of another in a contract, or security, or property which is in litigation, provided he does not make any advance beyond the mere support of the interest which he has so acquired. And, not to follow too far the subtle and rather finely drawn distinctions which are made in this respect of transactions against public policy, we may lay it down as well established in chancery, that a legatee may assign his legacy; also that a creditor may assign his interest in a debt, although he may have already commenced a suit to recover it.<sup>3</sup>

in his place to complete the service. *Sloan v. Williams*, 138 Ill. 43. Local statutes now regulate to a considerable extent the subject of assignments of wages, and confirm the right upon pursuance of prescribed formalities. See 78 Wis. 198; 47 Minn. 364.

<sup>1</sup> See Story Eq. Jur. §§ 769, 1040, and cases cited; *Heald v. Hay*, 3 Gif. 467; *Smith Man. Equity*, 238-240.

*Cf. Johnstone v. Cox*, 19 Ch. D. 17. And see as to Pensions, &c., c. *post*.

<sup>2</sup> See Act Feb. 26, 1863, § 1. But cf. 48 Fed. 48. And see, as to assigning a public contract, *Littlefield v. Pinkham*, 72 Me. 369; 43 Kan. 294; local statutes.

<sup>3</sup> See Story Eq. Jur. §§ 1049-1064, and cases cited; *Tyson v. Jackson*, 30 Beav. 384; *Smith Man.*

§ 75. **Assignment; The Subject continued; Modern Fusion of Equity and Common-Law Doctrines.**—Modifications, like these, of the rigor of the common law concerning the assignment of money rights, have produced a marked effect upon the modern jurisprudence of personal property.<sup>1</sup> And in

Equity, 241, 242. The subject of the assignment of rights of action, as tending to the common-law offences of champerty and maintenance, is left by the later decisions in a state of considerable uncertainty. See *Danforth v. Streeter*, 28 Vt. 490; and *Story Eq. Jur.* § 1057 c, 10th edition.

<sup>1</sup> A patent right is assignable, and so is a copyright; and such rights being conferred by statute they are likewise protected by appropriate legislation. In case of the former, where letters-patent are requisite, the thing to be assigned is not the mere parchment, but the monopoly conferred,—the right of property which it creates; and, when the party has acquired an inchoate right, an assignment of it is legal, and an invention may be sold as well before as after the application for a patent. *Act of Congress*, July 8, 1870; *Gayler v. Wilder*, 10 How. 477, 493; *Rathbone v. Orr*, 5 McLean, 132; 120 N. Y. 213. See chapter, *post*, on Patents and Copyrights.

An unliquidated balance of account is now assignable. *Westcott v. Potter*, 40 Vt. 271. But not items in a mutual account unadjusted and before a balance is struck. *Nonantum Co. v. Webb*, 124 Penn. St. 125. Assignment of the right to sell and canvass for a patented machine as agent may be verbal. *Springfield v. Drake*, 58 N. H. 19. And a claim for damages, though arising *ex delicto*, of a kind which on the death of the party would survive to his executors or administrators as assets, may also in many instances be assigned. *Freeman v. Newton*, 3 E. D. Smith, 246; *McKee v. Judd*, 12 N. Y. 622;

*Quin v. Moore*, 15 ib. 432. But a mere right of action for a tort is not assignable unless statute permits. *Hunt v. Conrad*, 47 Minn. 557; *Murray v. Buell*, 76 Wis. 657; *Central R. v. Brunswick R.*, 87 Ga. 386. Nor the right to bring a bill in equity for a fraud committed on the assignor. *Gardner v. Adams*, 12 Wend. 297; *Story Eq. Jur.* § 1040 h; *Dunklin v. Wilkins*, 5 Ala. 199; *Dickinson v. Seaver*, 44 Mich. 624; 104 Mass. 353. And see *Dewitt v. Brisbane*, 16 N. Y. 508. For in these last two instances an assignment is thought to be contrary to public policy, and savoring of the character of maintenance; grounds, as we have just seen, upon which equity refuses to lend its assistance to petitioners. *Supra*, § 74. But as to waiving the tort one may assign a right of action for conversion. *Smith v. Thompson*, 94 Mich. 381. One's interest in a suit may be assigned in various modern instances. As a suit for negligence. 78 Mich. 681. Or against a common carrier for loss or injury to goods. *Norfolk R. v. Read*, 87 Va. 185. Or any cause of action founded on injury to property which survives. 46 Wis. 118; 100 Mo. 406. But an instalment of alimony not yet due is not assignable. *Kempster v. Evans*, 81 Wis. 247. Nor is a contract founded in personal trust and confidence assignable at the option of one party alone. *Lansden v. McCarthy*, 45 Mo. 106; 138 Ill. 43. A promissory note with its accompanying bond or guaranty may be thus transferred. 43 Minn. 466. Or stock certificates with their incidental rights. Wages or earnings are assignable. § 74,

this country, where we find that, in many States, a fusion, more or less imperfect, of equity and common-law doctrines is gradually being accomplished, it appears to be already a well-settled rule that, if the assignment of a debt be followed by the debtor's promise of payment to the assignee, the latter may enforce it by a suit in his own name; inasmuch as such a promise operates as a ratification of the duty recognized in equity which resulted from the assignment.<sup>1</sup> This

note. And the preference or lien that goes with it. Or a broker's or agent's profits. 82 Me. 458. Or a lawyer's fees in a suit, subject to equities of parties litigant. 36 Fed. 147. Heirs or legatees may assign. 142 Mass. 366; 62 Hun 622; even expectancies in an ancestor's estate. 160 Penn. St. 156. Or partners, so as to give the assignee the right to sue for a partnership accounting. *Greenwood v. Marvin*, 111 N. Y. 423. A right of action on a contract is assignable, unless statute or the nature and terms of the contract exclude it. *First Nat. Bank v. Maxfield*, 83 Me. 576. Particularly if its obligation may be discharged by a mere money payment. *Rochester Co. v. Stiles Co.*, 135 N. Y. 209. The limits prescribed in a contract must be observed. *Burck v. Taylor*, 152 U. S. 634. Statutes are found in aid of this right to assign. And see 159 Mass. 477.

It is held against public policy for an executor (*semble* any fiduciary in the probate court) to assign his fees not yet ascertained and approved. *Worthington, Re*, 141 N. Y. 9.

<sup>1</sup> *Compton v. Jones*, 4 Cow. 13; *Crocker v. Whitney*, 10 Mass. 316; *Cromelien v. Mauger*, 17 Penn. St. 169; 2 Am. Lead. Cas. 5th ed. 145, 209, and cases cited; *Tiernan v. Jackson*, 5 Pet. 580.

"If," as was observed in a Pennsylvania case, "there be a debt due by the defendant, which has been assigned to the plaintiff, and in con-

sideration of that debt and that assignment the defendant expressly promises to pay the plaintiff, the latter has a good cause of action." *Per Lowry, J.*, in *Cromelien v. Mauger*, 17 Penn. St. 169. But the law courts of England do not seem to have proceeded quite so far in favor of the assignee; for they adhere very strictly to the doctrine that a promise made by the debtor to his creditor for the payment of his debt to a third person is not valid unless such third person is a party to the contract, and agrees to relinquish some claim or demand against the original creditor; even though such third person subsequently accepted the promise in lieu of an original demand which he had against the original creditor. *Cochran v. Green*, 9 C. B. n. s. 448. See *Lilly v. Hays*, 5 A. & E. 548. In New Hampshire it has been decided directly to the contrary. *Warren v. Batchelder*, 16 N. H. 580. But see *Blymire v. Boistle*, 6 Watts, 182. See Am. Lead. Cas. 5th ed. 209-217. The common-law objection to such a transaction would be that the third person does not thereby discharge the original creditor from liability on the debt due to himself, but accepts the debtor's liability to the original creditor as a sort of collateral security for his own benefit. But in equity such a transaction would be viewed as an equitable appropriation, transfer, or assignment of the debt. And, to sustain an equitable assignment, it is not necessary that the debt, on

subject is regulated by various practice codes as to the party in whose name a suit should be brought; but there are still various informal assignments which, if not legal, are upheld as equitable.

§ 76. **The Same Subject; What may now be assigned.** — Every species, therefore, of incorporeal personal property, with a few nominal exceptions, — as certain rights to litigate, whose transfer is still deemed repugnant to sound policy, or made illegal by statute,<sup>1</sup> and in positive instances things with no actual or potential existence,<sup>2</sup> — may now be assigned. Debts, claims, and demands of a money value may accordingly change owners; which is constantly done, though not always without pursuing formalities of a peculiar sort, based upon the theory that an incorporeal chattel of a particular class requires delivery of its appropriate muniment or voucher and of a writing of transfer besides. Equity is constantly encroaching upon the legal doctrine of assignment, and nullifying the letter of transfer requirement, out of regard to the transferring party's intent.<sup>3</sup> All personal property of an incorporeal character, if not negotiable, may, as a rule, be

account of which the transfer is made, should be satisfied; it is enough that it exists; and an assignment by way of collateral security is as valid as if it were accepted in payment. See 3 Lead. Cas. Eq. 379, 3d Am. ed.; 2 Am. Lead. Cas. 214, 215. And see chapter on Debts, *post*. It is towards this latter and more liberal view of an assignment of money rights that the American courts are steadily tending.

"The ordinary course," says Bovill, C. J., in a recent English case, "where it is intended to give a security on a fund in the hands of a third party, is to give an order upon such third party to pay, or an authority to the creditor to receive, the money." *Field v. Magaw*, L. R. 4 C. P. 660. In this case it was held that a mere verbal promise (without notice to the debtor) to pay money when the debtor

received a debt due him from a third person constituted no assignment of such third person's debt. *Ib.* Upon the doctrine of equitable assignment of a debt, which is subtle, the common-law courts inclined to put a restraint. And yet in English practice it is a proper equitable plea (allowed in a court of law, since otherwise equity would enjoin), that the plaintiff assigned the debt to B, who gave notice to the defendant, and that the assignment still remains in full force. *Jeffs v. Day*, L. R. 1 Q. B. 372.

<sup>1</sup> *Supra*, § 74 and note. All right and title to the goods in a replevin suit is upheld. *Caldwell v. Perry*, 86 Mich. 266.

<sup>2</sup> *Kendall v. United States*, 7 Wall. 113; *Gragg v. Martin*, 12 Allen, 498.

<sup>3</sup> *Winfield v. Hudson*, 4 Dutch. 255; *Welch v. Mandeville*, 1 Wheat. 236, *per* Story, J.



assigned by the owner at the present day; and even the transfer of a negotiable instrument by mere delivery, without the technical indorsement, has been in certain instances protected, for the transferee's benefit, on the broad basis of a transferring intent and an equitable assignment; though an assignment imports not, like an indorsement, the ability of the primary debtor to pay, but rather, if for value, the thing's genuineness, as in a corresponding transfer of corporeal property.<sup>1</sup>

In this connection the terms "legal" and "equitable" assignments are sometimes used confusedly. The law has in truth so far succumbed to equity, that it now lends its support and protection to the enforcement of an assignee's rights, though in practice requiring suit to be brought in the assignor's name, — a practice, moreover, which local statute has largely modified. Equity, when invoked, pursues remedies after its own form. But the doctrine of legal assignment has become substantially that of equitable assignment, as concerns the right; and in general every transfer by assignment of incorporeal chattels, whether by deed, by writing not under seal, or even by delivery of the muniment or voucher with mere words of parol transfer (though local statutes often repudiate parol assignments to a great extent, while equity inclines to sustain them), is upheld in law as well as equity.<sup>2</sup>

§ 77. **The Subject continued; What constitutes an Assignment.** — As a general rule, anything written, said, or done in pursuance of an agreement, and for valuable consideration, or in consideration of some pre-existing debt,<sup>3</sup> to place a money

<sup>1</sup> *Wolfe v. Tyler*, 1 Heisk. 313; *Stiles v. Farrar*, 18 Vt. 444; *Dyer v. Homer*, 22 Pick. 253; *Giffert v. West*, 33 Wis. 617; *Robinson v. McNeill*, 51 Ill. 225; 60 Mich. 432. And see § 84, *post*, as to indorsement.

<sup>2</sup> See *Allen v. Pancoast*, Spencer (N. J.), 68; *Welch v. Mandeville*, 1 Wheat. 236; *Hooker v. Eagle Bank*, 30 N. Y. 83.

But the assignee of a legal right may not proceed by bill in equity

merely because he cannot sue in law in his own name. *Hayward v. Andrews*, 106 U. S. Supr. 672; *Walker v. Brooks*, 125 Mass. 241, *per* Gray, C. J., commenting upon *Story Eq. Jur.* § 1057 *a*.

<sup>3</sup> A valuable consideration actually rendered is a necessary element to an equitable assignment, the assignment being insufficient in law. *Tallman v. Hoey*, 89 N. Y. 537.

right or fund out of the original owner's control, and to appropriate in favor of another person, amounts to an equitable assignment. Hence no particular writing or form of words is necessary, provided only a consideration be proved, and the intention of the parties made apparent by suitable evidence.<sup>1</sup> And assignment of chattels corporeal or incorporeal is made, according to the nature of the property and the circumstances, by a direct transfer or by some draft or order upon a particular fund.

Any act, therefore, which amounts to an appropriation of a particular fund—as where an order is drawn for the whole of a specific sum or deposit—constitutes, in equity, an assignment thereof, and (upon due notice to the drawee) will bind it.<sup>2</sup> In like manner there may be an appropriation of this specific fund, *pro tanto*, to the amount of an order, which equity courts, at least, will protect.<sup>3</sup> But though the phraseology used is immaterial, provided the assigning intent be clear, there must be something more than a mere promise—an actual appropriation in fact, without reserving to the holder of the fund any control over it—to constitute an assignment.<sup>4</sup> And the splitting up of a demand, though otherwise admissible in equity, is said to be ineffectual as a part assignment, without the debtor's assent, that is to say, the assent of the third party who has the payment to make, inasmuch as it subjects him to responsibilities and embarrassments not originally undertaken by him;<sup>5</sup> a theory which

<sup>1</sup> Story Eq. Jur. § 1047, and cases cited; Row v. Dawson, 1 Ves. 332; Morton v. Naylor, 1 Hill, 583.

<sup>2</sup> Mandeville v. Welch, 5 Wheat. 277; Robbins v. Bacon, 8 Greenl. 346; Black v. Zacharie, 3 How. (U. S.) 483; McWilliams v. Webb, 32 Iowa, 577; Conway v. Cutting, 51 N. H. 407; Blin v. Pierce, 20 Vt. 25.

<sup>3</sup> Lewis v. Berry, 64 Barb. 593; Christmas v. Russell, 14 Wall. 69; Moody v. Kyle, 34 Miss. 506; Public Schools v. Heath, 2 McCart. 22. But only upon consideration, Alger v. Scott, 54 N. Y. 14.

<sup>4</sup> Christmas v. Russell, *supra*; Field v. Magaw, L. R. 4 C. P. 660; Canfield v. Monger, 12 Johns. 346; Blin v. Pierce, 20 Vt. 25; Story Eq. Jur. § 1044; Clarke v. Thompson, 2 R. I. 146.

<sup>5</sup> Story, J., in Mandeville v. Welch, 5 Wheat. 277. But as this assent may be implied, and notice of an assignment should always be given the debtor, the rule is not harshly enforced. See Gibson v. Cook, 20 Pick. 15; Stevens v. Bowers, 16 N. J. L. 16; Gardner v. Smith, 2 Heisk. 256; McPike v. McPherson, 41 Mo. 521;

in equity yields often, in these days, to the practical accomplishment of just ends.<sup>1</sup> A remittance may be specially made for paying off a certain creditor, so as to constitute an assignment of that remittance; and wherever A. owes B., and B. owes C., and it is mutually agreed that A. shall pay C. (the principle which is at the foundation of foreign exchange transactions), there is an assignment which the courts will protect,<sup>2</sup> if the mutual arrangement is complete.<sup>3</sup> Indeed, it has long been a settled principle that any liquidated and complete debt may be transferred by a triple arrangement, so that the debtor of the assignor shall become the debtor of the assignee, and that such an assignment is with sufficient consideration;<sup>4</sup> but (subject to modern qualifications as to giving a debtor notice of assignment<sup>5</sup>) the principle of the case requires not only a definite and existing fund or debt, but the assent of the debtor or depositary to the assignment.<sup>6</sup> A general order drawn on no particular fund is no assignment; and merely to draw upon the debtor or party who makes payment is insufficient, whether *pro tanto* or otherwise.<sup>7</sup>

No particular form of assignment is at the present day requisite; since the only indispensable thing upon which equity has insisted is that the assignor intended to transfer, and the

Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398.

<sup>1</sup> Exchange Bank v. McLoon, 73 Me. 498, and various English and American cases cited. The assignment of a fractional part of a fund is good in equity where the person who is to pay raises no objection. Kingsbury v. Burrill, 151 Mass. 199.

<sup>2</sup> Harwood v. Tucker, 18 Ill. 544; Wiggins v. McDonald, 18 Cal. 126.

<sup>3</sup> See Borden v. Boardman, 157 Mass. 410.

<sup>4</sup> Ib.; Fairlee v. Denton, 8 B. & C. 395; Crowfoot v. Gurney, 9 Bing. 372; Stiles v. Farrar, 18 Vt. 444.

<sup>5</sup> See *infra*, § 78.

<sup>6</sup> See Kendall v. United States, 7 Wall. 113, *per* Miller, J.; Ford v. Garner, 15 Ind. 298. An unaccepted

bill of exchange or draft is not even an equitable assignment. 90 Cal. 297.

<sup>7</sup> Hall v. Flanders, 83 Me. 242; Covert v. Rhodes, 48 Ohio St. 66. The check of a general depositor for part of his deposit is not an assignment *pro tanto* without the bank's acceptance. First Nat. Bank v. Clark, 134 N. Y. 368. See further Hull v. Culver, 143 Ill. 506; 87 Ga. 435.

But a check or draft or order upon an entire and specific fund makes a legal assignment. 132 Penn. St. 545. While part of a debt or money claim is not assignable at law, it may be assigned in equity, so as to constitute an equitable lien upon the fund. 149 Ill. 9.

assignee to accept the transfer: so that the latter might be enabled to come into court, and have the full formalities on his behalf. An instrument in the form of a deed setting forth the parties, the subject-matter, and the consideration, and reciting that the one party does hereby "grant, sell, assign, and set over" the subject-matter described, and all his "right, title, property, and interest" in the same, to the other party, "to have and to hold the same" to the latter, "his executors, administrators, and assigns, to his and their use and behoof forever," is a suitable means of making formal assignment; the instrument being properly dated and executed by the assignor, upon the addition of a power-of-attorney clause to enable the assignee to collect and recover the same, and being duly delivered.<sup>1</sup> Some such formal writing is peculiarly appropriate to the transfer of a mere debt, claim, or demand, like wages, a legacy, or a money balance due, which is utterly without visible or tangible voucher of title; and it may well accompany the delivery of certificates of stock, bonds, letters-patent, and other muniments of title, in case one of these latter money-rights be the property assigned. But other writings, manifesting by language the assigning intent, are constantly accepted by the courts as sufficient, if duly delivered, without regard to any particular form of words, or even requiring the use of the word "assign," or an expression of value received,—such as an order on the debtor;<sup>2</sup> a letter of attorney with words expressive of an assigning purpose, even though not irrevocable in terms;<sup>3</sup> or special written directions to the debtor;<sup>4</sup> while, on the other hand, are writings which have been pronounced insufficient because indicating less than an assigning

<sup>1</sup> See *Curt. Conveyancer*, "Assignments;" *Bromley v. Holland*, 7 Ves. 28; *People v. Tioga*, 19 Wend. 73. To execute an assignment without delivering it is insufficient. *Clark v. Boyd*, 2 Ohio, 56; *Ritter v. Stevenson*, 7 Cal. 388.

<sup>2</sup> *Field v. Magaw*, L. R. 4 C. P. 660; *Tiernan v. Jackson*, 5 Pet. 598; *Blin v. Pierce*, 20 Vt. 25; *Clarke v.*

*Thompson*, 2 R. I. 146; *Moore v. Lowrey*, 25 Iowa, 336; *Harrington v. Rich*, 6 Vt. 666; *Adams v. Robinson*, 1 Pick. 461.

<sup>3</sup> *Weed v. Jewett*, 2 Met. 608; *Bromley v. Holland*, 7 Ves. 28; *People v. Tioga*, 19 Wend. 73.

<sup>4</sup> See *King, Re*, 14 Ch. D. 179; 7 Ch. D. 419; *In re Hurst*, 7 Wend. 239; *Able v. Shields*, 7 Mo. 120.

intent on the owner's part, such as the mere authority to another to collect and receive on his behalf.<sup>1</sup> Assigning a security or document of title, not negotiable, by handing it over with the assignor's name indorsed on the back, is often held sufficient; the indication here being, not to indorse as in negotiable paper, but as it would appear (especially if the word "assigned" were written or there was a printed blank on the back of the instrument which was really signed by the assignor), to authorize the assignee to write a formal assignment to himself over the signature.<sup>2</sup> One should not expect indorsement of a non-negotiable instrument like a stock certificate to have the same effect as indorsing a bill or note; though mercantile tendency is so greatly to assimilate all such instruments.<sup>3</sup> Far less than this is acceptable, however. Even gifts, transfers utterly without consideration, are now established, as to many species of incorporeal chattels, by merely delivering the security or document of title with no other writing whatever;<sup>4</sup> which is a rule of application, no less, but rather more, to transfers for value.<sup>5</sup> There should be, doubtless, the intent to transfer title accompanying the delivery; but, upon proof of suitable intent, any assignment by word of mouth will stand, as the rule is now applied,—even, as it is held, the assignment of an account, or other incorporeal money right utterly without corporeal voucher; and the verbal assignment which is thus established by the conduct of the parties, as what they really meant, is at least enough to entitle the assignee to equitable protection in the courts, proper notice thereof having been given to the

<sup>1</sup> *Green v. Ashby*, 6 Leigh, 135; *Spain v. Hamilton*, 1 Wall. 604; *Robinson v. Tipton*, 31 Ala. 595; *Ford v. Garner*, 15 Ind. 298; *Boesch v. Graff*, 133 U. S. 697.

<sup>2</sup> See *Nevill v. Hancock*, 15 Ark. 511; *Ryan v. Maddux*, 6 Cal. 247; *Odenheimer v. Douglass*, 5 B. Mon. 107; *Henley v. Bush*, 33 Ala. 636.

<sup>3</sup> See 122 N. Y. 53, as to indorsing a tax certificate by way of assignment.

<sup>4</sup> 2 Schoul. Pers. Prop. §§ 75, 166; Story Eq. Jur. § 1047. And see *Lacey v. Lacey*, 7 Penn. St. 251; *Crain v. Paine*, 4 Cush. 483; *Boyd v. Rockport, &c. Mills*, 7 Gray, 406. Hence one might deliver the security so as to give the transfer effect, though an assignment accompanied it which he failed to execute properly. *Mowry v. Todd*, 12 Mass. 281.

<sup>5</sup> But cf. 89 N. Y. 537.

debtor.<sup>1</sup> A like principle is applicable to re-assignments;<sup>2</sup> and parol authority given by the owner to another to assign for him in writing has been pronounced satisfactory.<sup>3</sup> An

<sup>1</sup> *Crane v. Gough*, 4 Md. 316; *Pass v. McRea*, 36 Miss. 143; *Noyes v. Brown*, 33 Vt. 431; 65 Vt. 71; *Garnsey v. Gardner*, 49 Me. 167; *Currier v. Howard*, 14 Gray, 511; *Cleveland v. Martin*, 2 Head, 128; *Briggs v. Dorr*, 19 Johns. 95; *Galway v. Fullerton*, 2 C. E. Green, 390; *Durst v. Swift*, 11 Tex. 273.

<sup>2</sup> *Ball v. Larkin*, 3 E. D. Smith (N. Y.), 555; *Sumpter v. Tucker*, 14 Ark. 185. The doctrine of the text is affected somewhat by local statutes and practice, as applied to certain classes of personal property. But the rule is broadly applied as to strictly personal chattels; even to dispensing in most States with assignments of bonds and other specialties by instrument as solemn as the original. See *Currier v. Howard*, 14 Gray, 511; *Gillett v. Campbell*, 1 Den. 520. But see *Chadsey v. Lewis*, 1 Gilm. 153. Mortgages of personal property follow the rule. But the principle is not universally admitted as to mortgages of real estate. Cf. *Duffield v. Elwes*, 1 Bligh, n. s. 533; *Allen v. Pancoast*, 1 Spencer, 68; *Prescott v. Ellingwood*, 23 Me. 345; *Olds v. Cummings*, 31 Ill. 188.

<sup>3</sup> *Spiker v. Nydegger*, 30 Md. 315.

"According to the modern decisions," said Chief Justice Shaw, of Massachusetts (1866), "courts of law recognize the assignment of a *chose in action*, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment, for his own benefit. But," he adds, "in order to constitute such an assignment, two things must concur: first, the party holding the *chose in action* must, by some significant act, express his intention that the assignee shall have the debt

or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement upon which the debt or *chose in action* arises; and, secondly, the transfer shall be of the whole and entire debt or obligation in which the *chose in action* consists, and as far as practicable place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable." *Palmer v. Merrill*, 6 Cush. 282, 286.

In the present case, the insured person under a life policy, by his indorsement in writing, assigned part of the sum thereby insured, but still kept the policy in his hands; and upon this ground, as well as others, it was held that the assignment was insufficient, although notice of the assignment had been given to the insurers. *Palmer v. Merrill*, 6 Cush. 282. But, when accompanied by suitable delivery, the assignment of a life-insurance policy is good, whether absolutely or by way of mortgage or pledge to secure some debt. *Wright v. Wright*, 1 Ves. 409; *Ashley v. Ashley*, 3 Sim. 149; *St. John v. Am. Mut. Life Ins. Co.*, 3 Kern. 31. See *post*, as to Life Insurance. Policies of insurance against fire or marine risks are not of their own nature assignable, being in the nature of personal contracts with the party insured; though, with the insurer's assent, an assignment may be and frequently is effected, where, for instance, the insured property is sold or made security for borrowed money. *Flanders Fire Ins.* 69, 434; *Lynch v. Dalzell*, 4 Brown Parl. Cas. 431; *Ætna Ins. Co. v. Tyler*, 16 Wend.

instrument of assignment ought of course to be suitably delivered and received, as between the parties.<sup>1</sup>

§ 78. **The Subject continued; Notice of Assignment to Debtor, etc.**—The principle of an assignment being, where incorporeal rights are concerned, that three parties, the assignor, the assignee, and the debtor, are to be regarded in the transaction, the rights of an assignee are not taken to be perfect so long as the debtor is utterly ignored. The old-fashioned assignment viewed the three parties as standing on an equal vantage ground of mutuality.<sup>2</sup> But the modern rule pays less deference to the debtor, unless specially compelled by statute or the contract; for it is usually satisfied when simple notice of the assignment is given to the debtor. In order, then, to perfect an assignment of incorporeal personalty not of a negotiable character, there must be at least notice of such assignment given to the debtor; else, by the law of England and many of the United States, the assignee's rights are postponed to the subsequently acquired *bond fide* claims of creditors and purchasers against the assignor, and to all intervening rights and equities of the debtor himself.<sup>3</sup> The debtor avoids the assignee's claim by *bond fide* paying the assignor before notice of the assignment; though, upon the receipt of notice, his relations are changed, and he makes payment to any other party than the assignee

385. See *post*, chapters on Insurance. If a bond is assigned, it should be delivered to the assignee. See *Smith Man. Eq.* 247; *Carey v. Dennis*, 13 Md. 1; *Chase v. Breed*, 5 Gray, 440. And the assignment of shares in joint-stock companies, such as banks and railroad companies, by way of pledge or security for money advanced, is usually effected by delivery of the certificates, with a power of attorney to the lender to make the actual transfer on the company books; while upon an absolute sale of stock the old certificates should be delivered up to the company and new ones issued. 2 Kent Com. 577, n.

and *c. post*, on Stocks and Shares. Upon this topic we shall have more to say, when we consider at length the various species of incorporeal property.

<sup>1</sup> See assignment void for want of delivery before the assignor died. 50 Ohio St. 444.

<sup>2</sup> *Supra*, § 73.

<sup>3</sup> *Dearle v. Hall*, 3 Russ. 1; *Bishop v. Holcomb*, 10 Conn. 444; *Murdock v. Finney*, 21 Mo. 138; *Clodfetter v. Cox*, 1 Sneed, 330; *Ward v. Morrison*, 25 Vt. 593; *Fisher v. Knox*, 13 Penn. St. 622; *Porter v. Dunlap*, 17 Ohio St. 591; *Field v. Magaw*, L. R. 4 C. P. 660

at his peril.<sup>1</sup> So, too, as to subsequent purchasers and creditors, whoever takes a new assignment with notice of a prior assignment to another, which carried the legal title, acquires no interest in the thing; while a second assignee, who takes without such notice and gives the debtor the first notice of assignment, has the priority.<sup>2</sup> With such qualifications an assignment is to be pronounced valid as between assignor and assignee.<sup>3</sup>

But it should be added, that, as concerns the rights of subsequent attaching creditors and purchasers, there are certain States which hold to the contrary; regarding the assignment as complete in itself, so far as all but the debtor himself is concerned, though without notice of the assignment; and consequently permitting the first assignee to prevent the debtor from actually paying over to a third party, regardless of the latter's notification to the debtor, by making his own title known at that late day.<sup>4</sup> Cases may arise where the peculiar circumstances require, for perfect safety of the transaction, that third parties should be seasonably notified

<sup>1</sup> *Loomis v. Loomis*, 26 Vt. 198; *Hackett v. Martin*, 9 Greenl. 77; *Goodrich v. Stanley*, 23 Conn. 79; *Murdock v. Finney*, 21 Mo. 138; *Reed v. Marble*, 10 Paige, 409; *Eastman v. Wright*, 6 Pick. 322; *Field v. New York*, 6 N. Y. 179. The rule of notice applies where an executor or trustee or corporate officer is the party to pay the debt. *Parks v. Innes*, 33 Barb. 37; *Thayer v. Lyman*, 35 Vt. 646; *In re Hercules Ins. Co.*, L. R. 19 Eq. 302.

<sup>2</sup> *Dearle v. Hall*, and other cases, *supra*.

*Re Freshfield's Trusts*, 11 Ch. D. 198, reaffirms the principle of *Dearle v. Hall* (3 Russ. 1) against all technical objections; and holds that the second assignee of an equitable interest in a fund, who has given notice of his assignment to the fund-holder, takes priority of a first assignee who has failed to give notice. For notice

given to the legal depositary of the fund is going as far towards taking equitable possession as it is possible to go. *Ib.*, citing 3 Russ. 1, 58.

A bank is justified in paying under an original assignment though receiving notice of a second assignment. *Beran v. Tradesmen's Bank*, 137 N. Y. 450.

<sup>3</sup> See *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Bishop v. Holcomb*, 10 Conn. 444. Notice to a debtor is not always a prerequisite in equity, especially where there is no contest between the assignor and his assignees.

<sup>4</sup> *Warren v. Copelin*, 4 Met. 594; *Bank of Valley v. Gettinger*, 3 W. Va. 309.

All this is matter of statute regulation to a considerable extent, especially with reference to particular classes of transactions. *Post*, § 82.



who might otherwise be misled, or *bond fide* holders without notice; and where again there is some party holding the chattel who himself needs to be notified, though rather a bailee than a debtor.<sup>1</sup>

Notice to the debtor suffices without showing the security or offering evidence of the assignment, especially if the debtor asks for no proof; notice in court has been to a certain extent deemed acceptable; implied notice too, and likewise the debtor's own admissions, will charge him, not actual notice alone.<sup>2</sup> But whether actual or constructive, there should be a positive notice of one's title under the assignment sufficient to put the debtor, bailee, or fund-holder on his guard.<sup>3</sup> Nor can the want of notice to the debtor by the first assignee avail a subsequent creditor or purchaser who himself is chargeable with notice of the assignment.<sup>4</sup> It is notice to such creditor, rather than notice to the debtor, which the rule in such a case exacts; <sup>5</sup> and notice by the assignee's procurement binds as well as notice given by the assignee personally.<sup>6</sup>

Where the assignee himself sells or incumbers a money right which has been equitably assigned to him, notice in fact should be given to the debtor or holder of the fund assigned; else, if he was only notified of the first assignment, his payments to the first assignee will sufficiently discharge him.<sup>7</sup> The debtor, fund-holder, or bailee is entitled to set off his own lien claims against the assignment, and equities be-

<sup>1</sup> Notice to one of joint trustees of a fund will suffice. *Ward v. Duncombe*, [1893] App. Cas. 369. Notice to one of the selectmen of the town suffices, as financial agents. 63 Vt. 296. And as to a city, see *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246. But there must be a notice. 137 Penn. St. 328. See 43 La. Ann. 1114.

<sup>2</sup> *In re Hercules Ins. Co.*, L. R. 16 Eq. 302; *Bean v. Simpson*, 16 Me. 49; *Jewett v. Dockray*, 34 Me. 45; *Buchanan v. Taylor*, Add. (Pa.) 154; *Dale v. Kimpton*, 46 Vt. 76.

<sup>3</sup> See *Kellogg v. Krauser*, 14 S. & R. 137; *Robinson v. Marshall*, 11 Md. 251; *Anderson v. Van Alen*, 12 Johns. 343; *Stewart v. Kirkland*, 19 Ala. 162; *Cahoon v. Morgan*, 38 Vt. 234.

<sup>4</sup> *Dearle v. Hall*, 3 Russ. 1; *Bishop v. Holcomb*, 10 Conn. 444; *Creed v. Lancaster Bank*, 1 Ohio St. 1.

<sup>5</sup> See *Brady v. State*, 26 Md. 290.

<sup>6</sup> *Barron v. Porter*, 44 Vt. 587.

<sup>7</sup> *Stocks v. Dobbins*, 4 D. M. & G. 11, 17. And see *Wms. Pers. Prop.* 5th Eng. ed. 377-379.

tween the original parties must be respected by an assignee. So do original equities affect subsequent assignees.<sup>1</sup>

§ 79. **The Subject continued ; What an Assignment confers.**—An assignment carries with it the accruing interest or income of the principal thing assigned;<sup>2</sup> and further, concerning personalty at least, the assignment of a debt, the principal thing, is presumed to include as its incident an assignment of the collateral security which the assigning party may hold to enforce payment.<sup>3</sup> In short, the assignment

<sup>1</sup> *Burton v. Willin*, 6 Houst. 522 ; *Commercial Bank v. Burch*, 141 Ill. 519. Otherwise with negotiable paper.

<sup>2</sup> *Kane v. Bloodgood*, 7 Johns. Ch. 90 ; *Gannett v. Cunningham*, 34 Me. 56. And see *Boyle v. Leonard*, 2 Allen, 407, as to the assignment of wages carrying future wages under the engagement. And see, as to additional or subsequent machinery under an assignment, *Holroyd v. Marshall*, 10 H. L. Cas. 192 ; *Hope v. Hayley*, 5 El. & Bl. 845. The principle of such cases is that, if the assignment of after-acquired property does not strictly operate as an assignment to pass the title, it will nevertheless be effective as a license, on the part of the assignor, for the assignee to take possession and hold the property as part of his security. See, too, as to assigning an inchoate right of action, *The Wasp*, L. R. 1 Ad. & Ec. 367.

The fundamental principle of notice in equitable assignments, requiring all parties affected by the transaction between assignor and assignee to be notified, appears to be that everything should be done towards obtaining *quasi* possession that the subject admits of, so as to prevent payment by the holder of a fund or person indebted to the assignor himself, and to guard against the demands of subsequent assignees or purchasers, who might otherwise be deceived into the supposition that the assignor had still the complete

title ; also to some extent by way of an assignee's more adequate protection against the assignor himself. *Story Eq. Jur.* §§ 1046, 1047 ; *Loomis v. Loomis*, 26 Vt. 198 ; *Foster v. Blackstone*, 1 Myl. & K. 297. Thus, notice of the assignment of an insurance policy must be given to the insurer. *Thompson v. Tompkins*, 2 Dr. & Sm. 8 ; *Flanders Fire Ins.* 69, 434 ; *post*, chapters on Insurance. In the case of shares in a stock company, notice of pledge or transfer must be given to the company. See *post*, chapter on Stocks and Shares ; 2 Kent Com. 577 n. Where freight is assigned, notice to the charterers is required. *Brown v. Tanner*, L. R. 2 Eq. 806. Instances where the same principle applies might be multiplied. And our patent and copyright acts require the assignments of interests of this nature to be in writing and duly recorded at the proper public office, in default of which the assignment is void as against subsequent purchasers or mortgagees for valuable consideration without notice. See Act of July 8, 1870, §§ 86, 89 ; chapter on Patents and Copyrights, *post*.

<sup>3</sup> *Jones v. Huggeford*, 3 Met. 515 ; *Waller v. Tate*, 4 B. Monr. 529 ; *Craig v. Parkis*, 40 N. Y. 181 ; *Hurt v. Wilson*, 38 Cal. 263 ; *Fitzsimmons's Appeal*, 4 Penn. St. 248 ; *Strother v. The Hamburg*, 11 Iowa, 59 ; *Miller v. Hoyle*, 6 Ired. Eq. 269 ; *Story Eq. Jur.* § 1047 a.

entitles the assignee to every assignable remedy, lien, or security available to the assignor as a means of indemnity or payment, unless expressly excepted in the assignment. This doctrine is subject, however, to statute modification and the distinct agreement of the parties; and where, as in the case of a pledge and not a mere lien, the security should be in possession of the creditor, a pledgee's assignment of the debt ought to be accompanied by a delivery of the pledge in order to carry the security over.<sup>1</sup>

§ 80. **The Subject continued; Disputing Consideration, etc., of Assignment.** — The rule is general in equity, that the assignee's interest in incorporeal personalty shall prevail against all persons having express or implied notice of the trust or assignment, provided the assignment be *bond fide* and for valuable consideration.<sup>2</sup> An assignment, like any transfer, may be directly impeached for fraud upon the assignor or his creditors; in which event, supposing the transfer set aside, the debtor must respond, not to the assignee, but to the assignor or original creditor, or to those representing his interest, consistently with the finding in the case.<sup>3</sup> But, unless the title be thus disputed, it matters not, as between debtor and assignee, what consideration was paid; for the former must respond to the same extent as before (though the fact of an assignment puts him to the exercise of greater caution on his own behalf), while the latter is assumed to be the real party in interest, with a title fairly obtained upon adequate consideration.<sup>4</sup>

<sup>1</sup> See *Johnson v. Smith*, 11 Humph. 396; *Chapman v. Brooks*, 31 N. Y. 75; *Whittle v. Skinner*, 23 Vt. 531; *Dovey's Appeal*, 97 Penn. St. 153. Assignment of a contract, modified since its original execution, embraces such modifications. *Wood v. Donovan*, 132 Mass. 84. As to assignment of an overdue note, see *Wetmore v. Neuberger*, 44 Mich. 362; *Van Schoonhoven v. Curley*, 86 N. Y. 187. The assignee is here put upon inquiry.

<sup>2</sup> See *Henry v. Milham*, 1 Green, 266; *Anderson v. Van Alen*, 12

*Johns.* 343; *Laughlin v. Fairbanks*, 8 Mo. 367; *Kennedy v. Parke*, 2 C. E. Green, 415.

<sup>3</sup> See *Holbrook v. Burt*, 22 Pick. 546; *Lonsdale's Estate*, 29 Penn. St. 407; *Langley v. Berry*, 14 N. H. 82; *Crawford v. Brooke*, 4 Gill, 213; *Doolittle v. McCullough*, 7 Ohio St. 299; *Parmelee v. Cameron*, 41 N. Y. 392.

<sup>4</sup> *Huson v. Pitman*, 2 Hayw. 331; *Horn v. Thompson*, 11 Fost. 562; *Hancock's Appeal*, 34 Penn. St. 155; *Whittaker v. Johnson*, 10 Iowa, 161;

Under the rules of evidence, proof may be submitted to show that a transfer, — such as the indorsement in blank of a non-negotiable instrument, — which, on its face, purports an assignment carrying full title and ownership, was in reality only a transfer as security for a loan of money, or otherwise by way of mere bailment or trust;<sup>1</sup> for assignment may be for a special purpose, as concerns all parties affected by notice thereof.<sup>2</sup>

§ 81. **The Subject continued; Assignee's Rights and Remedies.** — But what is the assignee's position under a valid assignment? To use the common phrase, he stands in the assignor's shoes: that is to say, he takes the incorporeal money-right, or right in action, subject in general to all equities and offsets which at the time of assignment prevailed against his assignor; acquiring no more and no less than the assignor's rights, save so far as qualified by active fraud or the debtor's failure to receive immediate notice of the assignment. For no one can transfer a better right than he himself possesses. This rule is of universal application to assignments;<sup>3</sup> and consequently the *bond fide* assignee for value of a money-right without notice of an infirm title is much less favored than the corresponding holder of negotiable paper by indorsement, as we shall presently see.<sup>4</sup> It is further held, notwithstanding the distinction taken by some authorities between "latent equities," so called, and those prevailing between the original parties to the instrument, that the equities existing between the assignor and assignee of incorporeal personalty attend the title transferred to a subsequent assignee for

Belden v. Meeker, 47 N. Y. 307. Cf. Tallman v. Hoey, 89 N. Y. 537, where no actual assignment could be said to have taken place, and the presumption of the text was repelled.

<sup>1</sup> Baldwin v. Ely, 9 How. (U. S.) 580; Gerrish v. Sweetser, 4 Pick. 374; Owens v. Miller, 29 Md. 144; Cuthbert v. Wolfe, 19 Ala. 373. And as to the interpretation of particular assignments, see U. S. Digest, 1st Series, "Assignment," §§ 351-523.

<sup>2</sup> Ib.

<sup>3</sup> Mangles v. Dixon, 3 H. L. 702; Story Eq. Jur. § 1047; Bush v. Lathrop, 23 N. Y. 535; Ketchum v. Foot, 15 Vt. 258; Scott v. Shreeve, 12 Wheat. 605; Smith v. Rogers, 14 Ind. 224; Leathers v. Carr, 24 Me. 351; Decker v. Adams, 4 Dutch. 511; Faull v. Tinsman, 36 Penn. St. 108; Shotwell v. Webb, 23 Miss. 375; Jack v. Davis, 29 Ga. 219.

<sup>4</sup> §§ 83, 84.

value and without notice, the latter taking the exact position of his seller.<sup>1</sup>

It follows that the assignor will not be allowed to impair or defeat his *bond fide* assignee's rights, whether the assignment be enforceable at law, or only in equity;<sup>2</sup> that the assignee of incorporeal personalty will be protected against the assignor's hostile acts and declarations subsequent to the transfer;<sup>3</sup> and that, the transfer once made *bond fide*, the assignor's right of subsequent interference without his assignee's consent is limited to the right of requiring indemnity against costs in proper cases where suit is brought on the debt or demand in his name by the assignee, and of preventing experiments from being made at his risk in a litigation which concerns the debtor and assignee only.<sup>4</sup>

The assignee's rights against the debtor, too, are virtually those of the assignor previous to the assignment. Notice of the assignment of incorporeal personalty not negotiable, given by the assignee to the debtor (which has been shown essential to the transfer of a full title), fixes the latter's liability from the time he gets the notice, and cannot defeat any equity or offset then existing.<sup>5</sup> But it appears to be the duty of the debtor, upon receiving notice, to inform the assignee promptly of such equity or offset on his part as is evidently unknown to the latter.<sup>6</sup> After receiving notice

<sup>1</sup> Bush v. Lathrop, 22 N. Y. 535. See Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25; Davis v. Barr, 9 S. & R. 137.

<sup>2</sup> Chapman v. Haley, 43 N. H. 300; Blin v. Pierce, 20 Vt. 25; Parker v. Kelly, 10 Sm. & M. 184.

<sup>3</sup> Kimball v. Huntington, 10 Wend. 675; Halloran v. Whitcomb, 43 Vt. 306.

<sup>4</sup> Reed v. Nevins, 38 Me. 193; Gordon v. Drury, 20 N. H. 353. But as to fraudulent assignees, see Atkinson v. Runnells, 60 Me. 440.

<sup>5</sup> Leahy v. Dugdale, 34 Mo. 99; Huntington v. Porter, 32 Barb. 300; Kugler v. Taylor, 19 La. Ann. 100; *supra*, § 78.

<sup>6</sup> See Scott v. Jones, 1 Brock. 244;

*In re Hercules Ins. Co.*, L. R. 19 Eq. 302. But see Decker v. Adams, 4 Dutch. 511. *Qu.* as to how far this duty extends, beyond an obligation on the debtor's part not to mislead the assignee to the latter's disadvantage. The assignee of a *chose in action*, or security of any kind, where there has been no fraud, stands in the same situation as the assignor as to the equities arising upon it. He must be taken to be cognizant of them. It is his duty to make inquiries, and, as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If a loss arises, it

under a *bond fide* assignment, the debtor must make payment to the assignee, and recognize him as owner, until correspondingly notified of a sub-assignment and further change of ownership;<sup>1</sup> and equities between himself and the assignor later than the assignment and receipt of notice are unavailable.<sup>2</sup> In the case of various partial assignments duly recognized by the debtor, assignees have liens in the order of the respective assignments.<sup>3</sup> And should the debtor prove insolvent, all rights of priority which the assignor may have had, pass to his assignee.<sup>4</sup>

Where it becomes necessary to sue the debtor, the old rule of the common law requires an assignee to sue in the name of the assignor, but for his own benefit: and there are numerous decisions which prohibit the assignee from bringing the suit in his own name upon certain non-negotiable choses; unless, indeed, an express promise has passed from the debtor to himself which may serve as the basis of the suit.<sup>5</sup> But this awkward rule, which exposes the assignor to hazard while forcing the assignee into a circuitous pro-

falls upon him whose duty it was to make the inquiries, and who has not made them. *Cator v. Burke*, 1 Bro. C. C. 434; *Turton v. Benson*, 1 P. Wms. 496; *Chambers v. Goldwyn*, 9 Ves. 264. But if the notice given by the assignee discloses, on the face of it, that which induces the belief that he has been deceived in accepting the assignment, the creator of the security is bound to inform the assignee of the real circumstances; and, if he should not do so, he may be bound to perform the stipulations of the security, without being allowed to take advantage of the equities existing as between the assignor and himself. *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 248. Yet, where no fraud exists, nothing to lead to a conclusion in the creator's mind that the other party has been deceived, he is not bound to volunteer information to the assignee. *Mangles v. Dixon*, 3 H. Ld. Cas. 702.

<sup>1</sup> *Myers v. South Feather, &c. Co.*, 14 Cal. 268; *Leahi v. Dugdale*, and other cases *supra*.

<sup>2</sup> See *Bartlett v. Pearson*, 29 Me. 9; *Cummings v. Fullam*, 13 Vt. 434; *Daviess v. Newton*, 5 J. J. Marsh. 89; *Upton v. Wallace*, 44 Vt. 552.

<sup>3</sup> *Chester v. Jumel*, 125 N. Y. 237. Otherwise where not recognized. *Ib.* See § 82, *post*.

<sup>4</sup> *McAvity v. Lincoln Co.*, 82 Me. 504.

<sup>5</sup> *Pollard v. Somerset Fire Ins. Co.*, 42 Me. 221; *Skinner v. Somes*, 14 Mass. 107; *Mt. Olivet Cemetery v. Shubert*, 2 Head, 116; *Ruckman v. Outwater*, 4 Dutch. 571; *McKinney v. Alvis*, 14 Ill. 33; *De Barry v. Withers*, 44 Penn. St. 356; *Clarke v. Thompson*, 2 R. I. 146; *Smilie v. Stevens*, 41 Vt. 321. See *Reed, J.*, in *De Barry v. Withers*, *supra*, as to the debtor's express promise to the assignee.

cases of sale, assignment, and transfer generally, where there has been no such manifest delivery of the property or transferred possession as might suffice to put third parties on their guard. Such statutes have accordingly a special reference to the assignment of money rights or incorporeal property; they insist upon a writing (with perhaps witnesses or an acknowledgment), and the assignment under American policy should be recorded.<sup>1</sup> The general policy of such statutes is to protect subsequent purchasers and incumbrancers without notice, without necessarily disturbing the rights of the original parties to the transaction as between themselves.

§ 83. **Negotiable Instruments excepted from the Old Rule of Assignment.** — To the old rule which makes the assignment of incorporeal chattels personal, or things in the nature of a *chose in action*, ineffectual at law, or at least ineffectual without a power of attorney to enable the assignee to sue, negotiable instruments always constituted an exception.<sup>2</sup> These are, most commonly, bills of exchange, promissory notes, and bank checks.

It is of the essence of a negotiable instrument that the legal right to that which is evidenced by it, and the right of action on it in case of a default, are transferable from one person to another, so as to enable the latter to sue upon it in his own name. Bills, notes, and checks are negotiable to an ample extent; they may pass from hand to hand by delivery, with or without indorsement, as the case may require; and the transfer vests in the *bonâ fide* transferee a right of action in his own name on the instrument assigned.<sup>3</sup> A formal holder for value of a bill or note will not be affected by intermediate fraud or infirmity of title, of which he had

<sup>1</sup> See, *e.g.*, *Browning v. Parker*, 17 R. I. 183; 30 Fed. 653; 62 N. H. 43; *Burck v. Taylor*, 152 U. S. 634. A recorded assignment which conforms to statute takes precedence of an unrecorded one of earlier date. 83 Me. 286. But an unrecorded assignment might be good as between the parties. 82 Me. 412. And perhaps, too, as against those affected with season-

able notice of such assignment. An informal writing might be supported between the parties as an equitable assignment. 62 Mich. 235; § 77; *Moeser v. Schneider*, 158 Penn. St. 412.

<sup>2</sup> *Supra*, § 72.

<sup>3</sup> See 2 Pars. Bills & Notes, 279; *Smith Merc. Law*, 202; *Wms. Pers. Prop.* 5th Eng. ed. 112, 365.

no prior notice sufficient to put him on his guard, provided that he took the instrument before it became due, and in good faith.<sup>1</sup> But if this holder took the bill or note, being aware at the time of circumstances which rendered it improper that payment should be enforced, he has no better interest than that of the person who transferred it to him.<sup>2</sup> And the rule in case of transfer of an overdue bill or note is, that the holder takes it subject to existing equities.<sup>3</sup>

§ 84. *Indorsement as distinguished from Assignment.* — Negotiable paper follows the rule of indorsement where applicable rather than that of assignment;<sup>4</sup> though a strict comparison will show that our modern assignments are often hastily made after the fashion of indorsing over, as though the thing were negotiable; the usual effect being to authorize a formal assignment to be written on the back over the assignor's name.<sup>5</sup>

Indorsement in fact, is a quality pertaining to bills, notes, and other negotiable instruments, and, in strictness, to none other. One who means to transfer his title in any chattel of this class, expressed to be payable to himself or order, writes his name on the back of it before delivering the instrument, mainly with the intent of passing over his title in the chattel to the fullest extent; though a natural consequence would be to subject him to the liability of paying off the debt according to the tenor of the writing, in a certain contingency, as security for the party primarily liable.<sup>6</sup>

To use the mercantile phrases, an indorsement may be *in blank*, or where the indorser writes his own name simply, and thus gives his liability the widest range. It may be *in full*, or where he names the party to whom he indorses, and thus obliges the latter to sign, in turn, upon any new transfer; which might also be termed one sort of *restrictive* indorsement. It may be *restrictive* or *qualified*, even to the

<sup>1</sup> 1 Pars. Bills & Notes, 183, 184, 257, 278; Byles on Bills, 5th Am. ed. 34, 125, 127, 128, 158.

<sup>2</sup> 2 Pars. Bills & Notes, 603, 604. See also 3 Kent Com. 75-128; and c. *post*, on Bills and Notes.

<sup>4</sup> See *Harris v. Clark*, 3 Comst. 115; 49 Barb. 221; *Cushman v. Haynes*, 20 Pick. 132.

<sup>5</sup> *Supra*, §§ 78, 81.

<sup>6</sup> See c. *post*, on Bills and Notes.



extent of clearing himself of all legal liability as indorser, and merely for the purpose of conferring his title; as where he indorses "without recourse." On the other hand, one party may put his name upon the back of another man's negotiable paper, not primarily to enable the instrument to be formally transferred, but for the purpose of lending his name as security, so that the other may raise money upon it elsewhere; in which case the indorser, if receiving no consideration, but signing as a favor, stands with the qualified liability of *accommodation indorser*.

A negotiable instrument, when indorsed in blank or payable to bearer, has the negotiable character; but such instruments may for the time be deprived of their negotiable character.<sup>1</sup>

§ 85. **Various Classes of Negotiable Instruments considered.** — There are various instruments which are salable by mercantile usage, in much the same manner as a bill or note, and yet are not, properly speaking, negotiable; since they must be sued in the name of the original assignor. A bill of lading has sometimes been considered negotiable, for instance; since, by indorsement and delivery, it passes the property in the goods to the indorsee, subject to the right of the unpaid vendor to stop *in transitu*. But the better opinion is, that such a bill is only *quasi* negotiable, and the effect of indorsement is to transfer the property in the goods only, and not the right upon the contract itself; and generally, independent of local practice acts, the action cannot be maintained in the assignee's name.<sup>2</sup> Bank checks, though very much like bills of exchange in form, are not so to all intents; still they are negotiable in the fullest sense.<sup>3</sup> Coupon bonds, a new species of incorporeal chattels personal, which consist in bonds payable to bearer (usually under a corporate seal), and which for the most part have coupons or interest warrants annexed, are by late decisions put substan-

<sup>1</sup> See *c. post*, on Bills and Notes.

<sup>2</sup> 1 Pars. Contr. 289; 2 Kent Com. 549, n.; 1 Am. Lead. Cas. 5th ed. 40 *et seq.*

<sup>3</sup> Merchants' Bank v. State Bank,

10 Wall. 647; 1 Am. Lead. Cas. 5th ed. 407. A check is not an assignment of money in the hands of a banker. *Hopkinson v. Forster*, L. R.

19 Eq. 74.

tially on the general footing of negotiable paper, with the same qualities and incidents.<sup>1</sup> And the same thing has been declared true of the coupons or interest warrants themselves, detached from the bonds, if such coupons or warrants be in words negotiable.<sup>2</sup> To no other species of property than the foregoing can the term *negotiable* at this day be strictly applied; though upon various instruments, such as bills of lading, the local statute will be found to confer some of the advantageous incidents of negotiability.<sup>3</sup>

§ 86. **General Conclusion as to Assignment, etc.; Civil-Law Rule.**—The reader has thus perceived that, with the progress of modern civilization, and the growing wants of trade and commerce, the old common-law objection to the assignment of rights in the nature of a *chose in action* has come at last to amount to little more than a standing requirement that the assignee shall make use of the original assignor's name in bringing his suit on the thing assigned; and that even this is obviated to a considerable extent in equity proceedings, and in courts of law under local statutes; while in the case of negotiable instruments it is dispensed with altogether. The public policy which discouraged assignments of this character *per se* was a narrow and illiberal one. And in the civil law, as well as in the jurisprudence of the modern commercial countries of continental Europe, an opposite policy appears to have prevailed; for all debts were from an early period allowed to be assigned under the civil law system, if not formally, at least in legal effect; while for the most part, if not in all cases, they may now be sued for in the name of the assignee.<sup>4</sup>

§ 87. **As to Delivery; Chattels Corporeal and Incorporeal.**—Next, as to the absolute transfer by way of gift or sale of personal property, there is a distinction observable between

<sup>1</sup> *Murray v. Lardner*, 2 Wall. 110; *Morris Canal v. Fisher*, 1 Stockt. 700; *Johnson v. County*, 24 Ill. 92; *Clark v. City of Janesville*, 10 Wis. 136; 1 Am. Lead. Cas. 5th ed. 408; *In re Imperial Land, &c. Co.*, L. R. 11 Eq. 478.

<sup>2</sup> *Thomson v. Lee County*, 3 Wall. 330.

<sup>3</sup> §§ 321, 471.

<sup>4</sup> Cod. lib. 8, tit. 42, l. 1; 1 Domat, book 4, tit. 4, §§ 3, 4; Pothier on Sales, by Cushing, n. 550, 555-559; Story Eq. Jur. § 1040 b.

personal chattels corporeal and those incorporeal, which has been in a measure anticipated by what we have just said in reference to their assignment. This is not a suitable place for elaborating those important principles of law which relate to the gift or sale or to the transfer generally of personal property.<sup>1</sup> But we may notice in brief that delivery of the thing sold, in whole or in part, is an important element in every sale; and that, in cash sales, payment of the price by the buyer, and delivery of the goods by the seller, are immediate and concurrent acts which complete the transaction.<sup>2</sup> And a gift of personal chattels, to be effectual, should in general be accompanied by delivery of possession, whether the gift be one *inter vivos* or *causa mortis*.<sup>3</sup> Now the delivery of a corporeal chattel personal must be very different from that of a purely incorporeal chattel; for in the one case you can make a manual delivery of the thing, or what is equivalent to it; while in the other case, which is, strictly speaking, that of an invisible intangible thing, a manual delivery would be impossible. But the rule applicable to incorporeal chattels personal, or *choses in action*, is that, so far as the thing can be transferred at all (a subject which we considered incidentally while treating of assignments), such a delivery as the thing will admit of — a symbolical delivery — is admitted as the substitute for a manual delivery. Hence, where the thing sold is a bill of exchange, the bill should be delivered; where it is a policy of insurance, there should be delivery of the policy; where it is stock, of the old certificate as preliminary to the issue of a new one; where it is a bond, of the bond itself; and so on. And in general the written instrument which is evidence of the debt or money right should, if there be one, be delivered when that debt or right is sold.<sup>4</sup> The rule of symbolical delivery is sometimes applied to corporeal chattels likewise, in cases

<sup>1</sup> Gifts and sales are treated at length in vol. ii. of this work.

<sup>2</sup> 2 Kent Com. 496, and *n.*; Smith Merc. Law, 461, 472, 5th ed.; vol. ii. *post.*

<sup>3</sup> 2 Kent Com. 438; Wms. Pers. Prop. 5th Eng. ed. 34; vol. ii. *post.*

<sup>4</sup> See *supra*, §§ 72, 77; Civil Code La., arts. 2456, 2612.

where it is not possible to make an immediate and complete delivery of the thing sold or given; as in the instance of goods in a warehouse, where the delivery of the key has been held sufficient.<sup>1</sup> But it would appear that, in this latter class of cases, symbolical delivery is accepted instead of actual delivery, on the supposition that actual delivery can presently follow; for sooner or later the actual delivery of a personal thing corporeal, or movable proper, would be possible; whereas, of a money right or thing incorporeal, only some voucher or muniment of title can be actually delivered in transfer.<sup>2</sup>

§ 88. **Rule as to Transfer of a Ship.** — A peculiar rule is applied in the case of a ship, which, as we have seen, is a personal corporeal chattel. Partly because of the great bulk and value of such chattels, partly because it would be impossible to deliver property of this nature (whose element is the water) like things transported on land, and in a great measure from reasons of expediency and public policy appertaining to the intercourse of commercial nations with one another, a registry system has been fostered by legislation which assimilates the title and transfer of vessels very closely to that of real estate. The Registry Statutes of the United States, like those of England, have always required a certain registration in order to entitle the ship to the full privileges of an American vessel. The English statutes have gone so far as to require registration to make the transfer valid. And quite recently an act of Congress was passed which required the registration of all such transfers by sale, mortgage, or pledge.<sup>3</sup> And the universal custom under the law merchant is to require the transfer of a ship by a written document. Can, then, a ship be transferred, independently of a bill of sale or other written document, like any other chattel, by mere delivery? It seems to be reasonably certain

<sup>1</sup> 2 Kent Com. 446-448, and cases cited; *ib.* 500-504, and cases cited; 1 Atk. 171; *per* Lord Kenyon, 1 East, 194; *Packard v. Dunsmore*, 11 Cush. 282.

<sup>2</sup> See *Stevens v. Stewart*, 3 Cal. 140.

<sup>3</sup> See 1 Pars. Shipping, c. 2; and *post*, chapter on Ships and Vessels.

that it can ; and that, leaving legislation out of consideration, which might at any time control the question, the sale and ownership of a ship are regulated by the same principles as apply to corporeal chattels in general.<sup>1</sup>

§ 89. **As to Seizure and Attachment; Chattels Corporeal and Incorporeal.** — *Thirdly.* Another distinction is noticeable between corporeal and incorporeal chattels personal, in the matter of seizure and attachment. The usual mode of seizure in the case of corporeal personal property would be taking it into actual and manual possession ; as in the case where implements are seized for violation of the internal revenue laws. But an incorporeal chattel manifestly cannot be seized in the same way. Indeed, except for the garnishee or trustee process of which we have spoken,<sup>2</sup> or some similar remedy, a mere debt could not be attached or seized at all. Here, too, the principle seems properly applied, wherever a statute confers the right to seize or attach incorporeal chattels, of making a sort of symbolical seizure or attachment, such as the thing in its nature and according to its class admits of, sufficient to hold the property for judicial proceedings.<sup>3</sup>

§ 90. **As to Larceny; Chattels Corporeal and Incorporeal.** — *Fourthly.* *Choses in action*, or incorporeal chattels personal, were not, at the common law, the subject of larceny, because they were deemed to be of no intrinsic value, “nor importing any property *in possession* of the person from whom they were taken.” But bonds, bills, and valuable securities generally, being important muniments of title to some incorporeal right, are now rendered by statute the subject of larceny and punished accordingly.<sup>4</sup> There are negotiable instruments in these days whose possession by a *bond fide* holder for value would give title to the *chose* ; so

<sup>1</sup> *Ib.* ; *The Amelie*, 6 Wall. 18 ; which the recent case of *Miller v. Scudder v. Calais Steamboat Co.*, 1 United States, 11 Wall. 268, under Cliff. 370 ; s. c. 2 Bl. 372. And see the “Confiscation Acts” of 1861 and Pars. Partn. 2d ed. 550, and cases 1862, was decided.

<sup>2</sup> *Supra*, § 81.

<sup>3</sup> This is one of the principles upon

<sup>4</sup> *Calve's Case*, 8 Co. 33 ; 4 Bl. Com. 234, and notes by Chitty and others.

that the criminal safeguards ought to be very strong.<sup>1</sup> The reason of the old exemption ceasing, the exemption itself ought to be made to cease.

We have seen that even in the taking of things corporeal, such as animals, the alleged criminal offence may sometimes be justified by reason of the worthlessness of the thing taken.<sup>2</sup>

§ 91. **As to Husband's Marital Rights; Chattels Corporeal and Incorporeal.** — *Fifthly.* The title of the husband to his wife's personal property, upon marriage, is greatly affected, at the common law, by the distinction made between things corporeal and things incorporeal. All of the wife's corporeal chattels personal—that is, her *choses in possession*—vest in her husband absolutely; while his right to her *choses in action*, or incorporeal chattels personal, is qualified only; marriage operating in this latter case somewhat as a gift, upon the condition that the husband shall do some act, while the matrimonial state lasts, to appropriate such *choses* to himself, or, as it is called, “reduce them to possession.”<sup>3</sup> The technical terms applied in this connection would lead one to suppose that “reduction into possession” meant nothing more nor less than to turn the incorporeal property into corporeal property or make the *chose in action* a *chose in possession*. Many of the cases, indeed, support such a belief, so far as money debts or the old *choses in action* are concerned;<sup>4</sup> and yet, if this were in truth the ancient theory, it is found too narrow to fit the modern precedents.<sup>5</sup> As to chattels real, the title acquired by the husband upon marriage is of a somewhat anomalous nature.<sup>6</sup>

§ 92. **As to Survival of Remedies.** — *Sixthly.* While the

<sup>1</sup> See *post*, vol. ii. pt. iv.

<sup>2</sup> See *supra*, § 50.

<sup>3</sup> See Schouler Dom. Rel. 5th ed. §§ 82-85; 2 Bl. Com. 389, 396; 2 Kent Com. 130 *et seq.*, 351.

<sup>4</sup> 2 Kent Com. 137, 138; Schouler Dom. Rel. 5th ed. §§ 82-85.

<sup>5</sup> *Ib.* See, for instance, as to novating a debt by taking a new security to himself, *Arnold v. Ruggles*, 1 R. I. 165; *Dodgson v. Bell*, 3 E. L. & Eq. 542. See also, as to a husband's as-

signment of the *chose* by way of reduction, *Ib.*

<sup>6</sup> Schouler Dom. Rel. §§ 87, 88; 2 Kent Com. 134. The married women's acts, now constituting a prominent feature of English and American legislation, curtail the husband's common-law privileges very considerably; their policy being to allow the wife to keep as her separate property whatever she has at the time of marriage or subsequently acquires; so

corporeal chattels personal of a deceased person remain *in specie* after his death, and (with the exception, perhaps, of such things as heirlooms, emblements, and fixtures, of which we are to speak hereafter) go into the hands of his executors or administrators, to swell the assets of the estate, his incorporeal chattels do not in all cases even survive him. Thus, it was an old maxim of the law that damages for injuries to one's person or property died with the person to whom or by whom the injury was done; and hence a claim for damages, though it might be valuable to the wronged party while he lived, could never avail his personal representatives after his death. Statutes, enacted from time to time since the reign of Edward III. of England, have gradually modified this rule; so that now, in various cases, remedies are permitted to survive; yet, in other instances, particularly where the wrong is done to the person instead of the property, and local legislation affords no special remedy, executors and administrators have no power whatever to commence a new suit, nor to carry on one already begun to final judgment and execution.<sup>1</sup> But for debts founded upon contract, the personal representative may generally sue; and these, whether resting upon judgment, specialty, or parol agreement, together with such species of incorporeal property representing debts, as bills, notes, certificates of stock, coupon bonds, and the like, go in with corporeal chattels as part of the assets of the deceased person's estate. Accruing rents, annuities, salaries, and the like, all of which are incorporeal, may be lost by the death of the owner, on the ground of not being strictly due and payable at the time of his death; but these are now frequently saved by statutes which permit of an apportionment up to the date of the owner's death.<sup>2</sup>

that this whole doctrine of "reduction into possession" seems likely to pass into oblivion, as concerns the United States, at no very distant day. See Schouler *Hus. & Wife*, §§ 162, &c., for a full discussion of the doctrine concerning the wife's "separate

estate," together with the "married women's acts" of the several States.

<sup>1</sup> 1 *Wms. Ex'rs*, 6th ed. 739-752; Schouler *Ex'rs*, §§ 279, 280.

<sup>2</sup> *Wms. Ex'rs*, 776, 784, 785; Schoul. *Ex'rs*, § 277.

§ 98. **As to Effect of Time upon Title; Statutes of Limitation.**—*Seventhly.* We are to notice, as a final distinction between corporeal and incorporeal chattels personal, that while one's title in those of the former kind is strengthened by lapse of time, in many of those of the latter kind it becomes rather endangered. For if one has possession of a corporeal thing, such as an animal, money, or a box of jewels, the longer he keeps it, the stronger becomes his presumptive title. But a mere money right, which must be eventually enforced by collection or suit, is subject to our statutes of limitation; and unless the creditor sues within the period which the law permits, he loses his right and title altogether.<sup>1</sup> And the same may be said of the right to sue upon a bill or promissory note, or any other instrument which promises the repayment of a loan at some future time certain and not far distant.

This distinction is often found, however, of much less practical consequence when applied to some species of incorporeal chattels personal, such as shares in joint-stock companies and the loans of government or private corporations, where not only the written evidence of title is a visible and tangible thing, easily produced when occasion

<sup>1</sup> See Wms. Pers. Prop. 5th Eng. ed. 370. Upon the general subject of limitations, see elementary works of H. G. Wood, H. F. Buswell, and others. Our modern statutes of limitations put bounds to all private litigation, whether by real or personal action; and the parent act on this subject is the English statute of James I., passed in 1623, whose provisions have been extensively copied into the American codes. The statute of limitations affects quite differently corporeal chattels and those incorporeal or founded in a right to enforce some claim for money: for, in the former instance, lapse of time aids the possessor by shutting out contestants; while, in the latter, a possessor's title, though strengthened in this sense, is certainly weakened in an-

other, or by the delay to pursue his debtor and realize the demand.

Concerning the general purpose of statutes of limitations, judicial opinion has varied; but, at the present day, the legislative policy is highly favored, and they are allowed to operate, not because affording a presumption of payment liable to rebuttal, but as statutes of repose: consequently the legislative intent in this instance is not to be evaded by construction. Equity adopts the statute rule likewise, and, in cases within its own jurisdiction, applies by analogy the same bar which would have prevailed in a common-law action, wherever there are legal and equitable remedies pertaining to the same subject-matter; though, in cases of exclusively equitable cognizance,



requires, but payment of the debt which it represents is postponed indefinitely or for a very long period. Yet it is important even here to remember, in connection with dividends, interest instalments, and the income generally of personal chattels incorporeal.<sup>1</sup>

Stock certificates may continue outstanding until the company is wound up; mortgages, bonds, and long loans, until a future distant date specified; patent-rights and copyrights during the statute period conferring the monopoly; insurance policies for the stated term of the risk; leases so long as they run. But in all kinds of incorporeal personalty, some future period when the money right or valuable thing represented will mature for full collection or expire altogether is indicated.

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## CHAPTER V.

### HEIRLOOMS AND EMBLEMENTS.

§ 94. **Border Line between Real and Personal; Heirlooms, Emblements, and Fixtures.** — Among chattels personal of a corporeal nature there are some which form an exception to the general rule of transfer and alienation noticed in the last chapter, and which, indeed, are treated in certain respects as real rather than personal property. Instead of following the person of the owner wherever he goes, they remain stationary; and instead of devolving, after he dies, upon his executor or administrator, in the first instance, like other personal chattels, they are permitted to descend with the land and vest at once in his heirs as part of the inheritance. On the other hand, there are certain things annexed to the land,

chancery courts may not allow themselves to be hampered.

<sup>1</sup> In the foregoing chapter we have touched upon many doctrines whose full treatment must be postponed for the present; since they come under

the heading of "Title to Personal Property," an extensive subject, to which our later volumes are exclusively devoted. See vol. II., Personal Property, Schoul. Bailments, etc.

which become under special circumstances capable of severance and removal like ordinary chattels personal. Here we find ourselves at the border line which separates real from personal; and we shall do well to examine these special kinds of property somewhat at length. First, then, as to *heirlooms*; next, as to *emblems*; and, lastly, as to *fixtures*. The physical nature of an annexation, custom, the presumed or the express mutual understanding of the parties, the inherent fitness of the thing's association with the land or the unfitness, are all found elements for consideration in such a discussion.

§ 95. *Heirlooms, their Nature and Incidents.*—Heirlooms are such personal chattels as descend to the heir along with the inheritance, contrary to the usual rule, instead of passing to the executor or administrator of the last owner.<sup>1</sup> The word "heirloom" is probably compounded of "heir" and the Saxon *loma* or *geloma*, which signifies utensils or vessels generally; thus indicating simply the heir's utensils or goods. But some prefer the word "heir" and "loom;" that is, a frame to weave in. That would be a fanciful derivation enough; but Blackstone gives one which is even more so, by which he makes out an heirloom to be "nothing else but a limb or member of the inheritance."<sup>2</sup> "In some places," says Coke, "chattels, as heirlooms (as the best bed, table, pot, pan, cart, and other dead chattels movable), may go to the heir;" and he further adds that "the heirloom is due by custom and not by the common law."<sup>3</sup> The ancient jewels of the British crown were heirlooms from early times. So, it would seem, are public documents which the peers of England were wont to receive by way of gratuitous distribution.<sup>4</sup> In short, heirlooms, wherever found, may be con-

<sup>1</sup> 2 Bl. Com. 427; Wms. Pers. Prop. 5th Eng. ed. 12; Co. Lit. 18 b; Bouv. Dict. "Heirloom;" Webster's Dict. ib.; Worcester's Dict. ib.

<sup>2</sup> 2 Bl. Com. 427. And see Byng v. Byng, 10 H. L. 183, per Lord Cranworth.

<sup>3</sup> Co. Lit. 18 b. 1 Wms. Ex'rs, 806.

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681, &c., cites various other authorities which define heirloom, — Brooke; Spelman's Glossary; Les Termes de la Ley, &c., — all of which lay stress upon custom as the basis of the heir's right in such things.

<sup>4</sup> Upton v. Lord Ferrers, 5 Ves.

sidered as attending the inheritance, not because of any inherent characteristics which likened them to immovable property (as some seem to have supposed), but merely because some local custom favored the heir rather than the executor in this respect. Though not by nature inheritable, the heritable character is conferred by law upon it. And we all know that law and custom strongly foster family pride, wherever family relics are the subject of dispute. The modern tendency, certainly in the United States, is against what are, strictly speaking, heirlooms; we do not prefer the first-born; and it is not to be presumed that the ordinary rules which regulate the transmission of personal property are to be thus turned aside for the gratification of individuals, where the chattels possess an intrinsic value, apart from that which affection may set upon them.<sup>1</sup>

Heirlooms, it is held, cannot be devised or bequeathed by will; for the technical reason that the will cannot operate until *after* death, whereas the ancient custom takes effect the instant one dies; so that, the law preferring custom to the devise or bequest, they vest in the heir at once.<sup>2</sup> But, during his life, the owner may, of course, sell or dispose of chattels which would otherwise descend as heirlooms.<sup>3</sup>

§ 96. **Heirlooms, their Nature and Incidents; The Subject continued.** — There are some kinds of chattels which are treated as being in the nature of heirlooms, and which accordingly are permitted to pass to the heir with the inheritance. Thus, the coat-armour of an ancestor hung in a church, his sword, and other insignia of rank; ancient portraits and family pictures in a house, though not fastened to the walls, — all these have been withheld from the executor; and although, in some cases of this sort, annexation to real estate might seem to have determined the decision of the court, yet we are reasonably safe in supposing that the executor was required to leave them alone, from deference rather to that custom

<sup>1</sup> See notes of Chitty and others, to 2 Bl. Com. 427, 428.

<sup>2</sup> Co. Lit. 185 *b*; 1 Wms. Ex'rs, 6th Eng. ed. 681; Tipping v. Tipping, 1 P. Wms. 730.

<sup>3</sup> 1 Wms. Ex'rs, 682; 2 Bl. Com. 429. So the sovereign may dispose of the ancient crown jewels during his life. Cro. Car. 344.

which favored the heir, by permitting the family dignities to pass unimpaired so far as was possible.<sup>1</sup>

Some who have failed to separate these two distinct elements for consideration, — local custom and actual annexation to the freehold, — in passing upon articles which are in controversy between heir and executor, say that heirlooms are in general such things as are essential to the enjoyment of the realty ; such as cannot be taken away without damaging or dismembering the freehold ; and Lord Holt is reported to have said that a jewel cannot be an heirloom, but only “things ponderous.”<sup>2</sup> But this statement of Lord Holt is contradicted by what we have just said of crown jewels ;<sup>3</sup> and those who speak thus seem to have fallen upon the doctrine of fixtures (aside from custom altogether), which would be found sufficient for itself in determining what shall go as real and what as personal property.

And yet we must admit that a local custom may be founded to some extent upon a legal principle ; and certainly, whether this be true or not with respect to chattels in the nature of heirlooms, we find the doctrine of things incident to the freehold strangely blended with this of mere custom ; so that it would sometimes be hard to say whether a certain chattel were in the nature of an heirloom or of a fixture.

§ 97. **Heirlooms ; Doctrine as to Wild Animals.** — For example, there are some curious rules concerning the transmission of title to wild animals, upon the death of the person who had them in his enclosure. These are said to pass by way of incident to the freehold and inheritance, and not to go to the executor or administrator. Thus, deer in what the law considers a park, conies in a warren, and doves in a dove-house, will not come to the executor or administrator with the assets. The reason assigned by Coke is, that without them the inheritance would be incomplete ; but another

<sup>1</sup> See *Corven's Case*, 12 Co. 105 ; Raym. 728 ; 12 Mod. 520. See 2 Bl. 1 Wms. Ex'rs, 682. Shroud and coffin, gravestone, &c., cannot be considered as heirlooms. See *Teager v. Bowle*, 1 Add. 541.

Raym. 728 ; 12 Mod. 520. See 2 Bl. Com. 17, 427 ; 1 Wms. Ex'rs, 681 ; Wms. Pers. Prop. 13 ; Bouv. Dict. “Heirloom.”

<sup>2</sup> *Supra*, § 95 ; 5 Ves. 806.

<sup>3</sup> *Lord Petre v. Heneage*, 1 Ld.

reason mentioned by him, and one perhaps equally good (since an inheritance is thought to be complete without the dogs, horses, and other domestic animals, under like circumstances), is that the deceased had no transmissible personal right of property in them.<sup>1</sup> So, if a man buys fish and puts them into a pond, and dies, they pass with the water to the heir, or at all events, they do not go to the executor or administrator. Though, if the deceased had only a term of years in the land, it is said that the deer, conies, doves, and fish will go to the executor or administrator as accessory chattels, following the estate of the principal;<sup>2</sup> which last proposition might be quite true, provided the executor caught them all before the lease under his control ran out, and he had to vacate the premises. All this law seems to us to be best referred to that special or qualified right of property in animals remaining in an unreclaimed or wild state, which we have discussed in a former chapter.<sup>3</sup> And it is now the settled rule in England, and we doubt not in this country too, that deer in a park, or other animals upon private premises, when tame and reclaimed from their wild state, will pass to the executors or administrators, like any other domestic animals owned by the decedent.<sup>4</sup>

§ 98. *Heirlooms; Doctrine as to Title-deeds, Keys, etc.* — But there is another example, still more to the point, — that of title-deeds and other muniments of the inheritance. It is an established principle that whoever is entitled to land is entitled also to the deeds and chattels which concern that land, and afford evidence of his title. They have been called the sinews of the land;<sup>5</sup> and so closely are they associated with real estate, that they are held to pass, on its conveyance, without being expressly mentioned; the property in these instruments passing from the vendor to the purchaser by the simple grant of the real estate itself.<sup>6</sup> Upon the grantee's

<sup>1</sup> 7 Co. 17 b; § 50, *supra*. See Went. Off. Ex. 127, 14th ed.

<sup>2</sup> Com. Dig. Biens, B; Went. Off. Ex. 127. For use, however, and not for waste. See 1 Wms. Ex'rs, 666; Co. Lit. 53 a.

<sup>3</sup> *Supra*, §§ 48-50.

<sup>4</sup> Ford v. Tynte, 2 Johns. & H. 150; Morgan v. Abergavenny, 3 C. B. 768.

<sup>5</sup> Co. Lit. 6 a.

<sup>6</sup> Harrington v. Price, 3 B. & A. 170; Phillips v. Robinson, 4 Bing.

death, his heir, and not the personal representative, takes them ; nay, the very box or chest which has usually been employed for keeping them so far partakes of this nature as to go with the inheritance in like manner.<sup>1</sup> And there are recent English cases which discuss the respective rights, in this respect, of tenants in fee-simple, for life or in tail, and for terms of years ; the result of which is to establish that those who have an absolute estate of freehold may destroy the title-deeds at pleasure, or sell them for old parchment ; that freeholders with a qualified estate have but a temporary custody, and cannot injure or part with them ; and that tenants for terms of years have no right to deeds which relate to the freehold.<sup>2</sup>

In the United States this learning is of very little importance ; for our registration acts supersede the necessity of accumulating old deeds by way of muniment ; and a grantee is generally well satisfied with retaining the original instrument of conveyance to himself, and nothing more, provided the public record shows that his title is a good one.<sup>3</sup>

The keys of a house, too, are sometimes called "heirlooms," because they go with the house and land to the heir ; and a great variety of articles, besides, are enumerated by Blackstone and some other writers under this same head.<sup>4</sup>

§ 99. **Heirlooms ; Final Observations.** — But it seems to us that many things classed with heirlooms are more properly to be considered as in the nature of fixtures. For, in speaking strictly of heirlooms, we would naturally be supposed to refer to questions between heir and executor alone ; whereas in fixtures the controversy, though quite commonly between them, is often between other parties instead. And again,

106 ; Wms. Pers. Prop. 5th Eng. ed. 9, 10.

<sup>1</sup> 1 Wms. Ex'rs, 683 ; Went. Off. Ex. 14th ed. 156.

<sup>2</sup> 1 Wms. Ex'rs, 9-12, and cases cited ; Allwood v. Heywood, Ex. 11 W. R. 291 ; Ford v. Peering, 1 Ves. Jr. 76 ; Davies v. Vernon, 6 Q. B. 443. See Wms. Pers. Prop. 10, 11 ; 1 Washb. Real Prop. b. 1, c. 1.

Deeds and writings which relate not to the freehold, but to terms for years and other chattel property ; also letters of the decedent, do not go with the inheritance. Bac. Abr. tit. Ex'rs, H. 3.

<sup>3</sup> See 4 Kent Com. 456, and notes.

<sup>4</sup> See Bouv. Dict. "Heirloom ;" 2 Bl. Com. 427-429, and Chitty's note.

the question in heirlooms is largely that of local custom ; which question has only a slight bearing upon the doctrine of fixtures. Yet, for want of apt terms at the law, we may well distinguish between things in the nature of fixtures (like keys or title-deeds under some circumstances) and fixtures proper. The former are to be treated as immovables only by construction; and where they cease to be chattels, it is rather because of some logical connection which they bear to the real estate, their fitness, or, as it is said, their use or destination, than on account of qualities inherent in their substance.<sup>1</sup> Now, it is otherwise with fixtures proper. These are classed with more especial reference to their physical or material qualities; and to them may be applied the universal principle of law that movables will become immovables, by reason of accession, as when they are united with, or affixed to, or let into the house or land, or are otherwise annexed to that which is immovable.<sup>2</sup>

We may add, in passing, that the term "heirloom" has now come to be popularly applied, in England, to plate, pictures, or other articles of property which have been assigned by deed of settlement, or bequeathed by will to trustees, in trust, to permit the same to be used and enjoyed by the persons in possession for the time being, under such settlement or will, of the mansion-house in which the articles may be placed. If a will requires articles to be treated as heirlooms, they are not to be applied to the payment of the decedent's debts, unless in an extremity.<sup>3</sup> We have very little occasion to speak of heirlooms at all in the United States under our rules of descent and distribution.

§ 100. **Emblements; Rule as to Chattels Vegetable.** — Now as to the law of *emblements*. The right to emblements is associated with chattels vegetable, whose peculiar charac-

<sup>1</sup> See P. Voet de Reb. Mob. et Im-mob. c. 5, n. 1, p. 38. See 1 Washb. Real Prop. 5.

<sup>2</sup> P. Voet, *ib.* n. 4, p. 33; 2 Burge Col. and For. Laws, 6; also next c.

<sup>3</sup> See Wms. Pers. Prop. 5th Eng. ed. 13; *Harrington v. Harrington*, L.

R. 3 Ch. 564; *Duke of Newcastle v. Lincoln*, 12 Ves. 218; 31 Ch. D. 466. Lord Eldon, in *Clarke v. Lord Ormonde*, 1 Jacob, 114, speaks favorably of permitting certain portions of the effects to be treated as heirlooms, the will so providing.

teristics have already received some attention. Fruits, so long as they are hanging on the trees, the crops until they are gathered, and timber trees while they are standing, are things immovable, or real estate, because they are appropriately attached and appendant to the ground. But when the fruit or crops are gathered, or the trees cut down by the owner, as they then cease to be attached to the soil, they become movables or chattels personal.<sup>1</sup> Rightful severance, so intended, converts the thing from real to personal property.

Yet exceptions are admitted from deference to the mutual intention of the parties concerned. Thus, where trees are planted by the owner or tenant of the soil, to be transplanted and sold, they may be treated constructively at law as personal chattels; and hence a gardener or nurseryman, who occupies premises under a lease, may, at the end of his term, remove and dispose of the trees and shrubs which he has planted in the course of business.<sup>2</sup> But ordinarily a farmer who plants fruit-trees cannot sell and remove them against his landlord's consent.<sup>3</sup> And, of course, the exception is to be reasonably applied so as to prevent a malicious tenant from wantonly committing waste;<sup>4</sup> and so as neither to legalize wrongful severance nor to prejudice the rights of interested parties.

Again, there are cases where, contrary to the usual rule, growing timber has been considered a chattel as between grantor and grantee. As, for instance, where the owner of lands granted away the trees, and the grantee died before they were felled.<sup>5</sup> Here the law regards the intention of the parties, and considers that, as concerns themselves, a constructive severance has taken place. And the corresponding rule has been applied to the case of a conveyance of lands with a reservation of the trees to the grantor.<sup>6</sup>

<sup>1</sup> 2 Burge Col. and For. Laws, 7; 2 Bl. Com. 389; 1 Wms. Ex'rs, 6th Eng. ed. 668; *supra*, §§ 3, 4.

<sup>2</sup> Miller v. Baker, 1 Met. 27; Pen-ton v. Robart, 2 East, 88.

<sup>3</sup> Lee v. Risdon, 7 Taunt. 191; Doe v. Gunnis, 4 Taunt. 316.

<sup>4</sup> See Watherell v. Howells, 1 Camp. N. P. 722, *per* Lord Ellenborough.

<sup>5</sup> Stukeley v. Butler, Hob. 173; 1 Wms. Ex'rs, 6th Eng. ed. 668.

<sup>6</sup> Herlakenden's Case, 4 Co. 63 b. And see *supra*, § 14.



But trees and vegetables, or vines, bushes or shrubs, growing upon land pass presumably by a mortgage of the land as part of the realty, and consequently of the security.<sup>1</sup> And nursery trees planted by the owner of the land would pass by a mortgage of the land, though he mortgaged first and planted them afterward.<sup>2</sup> For if a reservation were mutually intended, it ought to have been expressed in the mortgage deed. So, too, as between vendor and purchaser, unsevered trees and vegetables or vines, bushes and shrubs, pass as part of the land on which they grow, under a conveyance without express words to the contrary;<sup>3</sup> and one entering into possession of the real estate by title paramount would presumably be preferred to any tenant.<sup>4</sup>

§ 101. *Diverse Ownership of Soil and Products; Statute of Frauds applied to Chattels Vegetable.*—We see, then, that growing trees may sometimes acquire the character and incidents of personal property, in accordance with the mutual intent of the parties, where the owner of the soil sells them to be cut and removed, and the purchaser has no right to occupy the soil for growing or supporting them there.<sup>5</sup> A difficulty here arises under the Statute of Frauds; for that statute requires the sale of interests in lands to be by instrument in writing; notwithstanding which rule, some cases seem to have treated a sale of growing trees as effectual to pass the title in them before they are cut, although not evidenced by deed; as if, indeed, they were chattels within contemplation of the statute itself. Some writers consider that the doctrine may be reconciled by treating a sale of this character, if by parol,

<sup>1</sup> *Hutchins v. King*, 1 Wall. 59.

<sup>2</sup> *Maples v. Millon*, 31 Conn. 598; 1 Washb. Real Prop. 3; *Price v. Brayton*, 19 Iowa, 309; *Adams v. Beadle*, 47 Iowa, 439.

As to whether the mortgage or sale of a crop not yet sown can pass a title, cf. *Hutchinson v. Ford*, 9 Bush, 318; *Argues v. Wasson*, 51 Cal. 620; *Apperson v. Moore*, 30 Ark. 56. Under a lease, a lien may be expressly reserved on the annual crops, pro-

duce, &c., of the land. *Everman v. Robb*, 52 Miss. 653; *McCaffrey v. Woodin*, 65 N. Y. 459. And see § 109.

<sup>3</sup> 1 Washb. Real Prop. 104; *Tripp v. Hasceig*, 20 Mich. 254.

<sup>4</sup> *Batterman v. Albright*, 122 N. Y. 484.

<sup>5</sup> *Claffin v. Carpenter*, 4 Met. 580; *Stukeley v. Butler*, Hob. 173; 1 Washb. Real Prop. 3; *Olmstead v. Niles*, 7 N. H. 522.

as a license rather than a grant of an interest in real estate ; which license, though revocable like other licenses, carries, if executed, the property in such trees as shall have been severed from the freehold. If, therefore, the purchaser has executed the license by which he was permitted to cut the trees, the license becomes irrevocable, and he may enter and remove them ; but so long as it remains executory only, no title passes to him.<sup>1</sup>

There are cases, however, which hold that a sale of such trees is within the Statute of Frauds and should be evidenced by writing.<sup>2</sup> And, even if a sale by parol be regarded as sufficient to vest an interest in the unsevered trees, so far as concerned the parties themselves, and possibly third parties with notice, it cannot avail against the purchaser of the freehold without notice, for this party would take the premises with the trees and crops as incident to the land.<sup>3</sup> But if the owner of the freehold conveys growing trees, as such, by deed, the Statute of Frauds is satisfied, and a constructive severance takes place at once, in accordance with the mutual intention of the parties, so that the vendee may afterwards pass title to them as chattels, without waiting for an actual severance.<sup>4</sup>

§ 102. *Emblements ; Title in Chattels Vegetable transmissible by Death.* — When the owner of real estate dies, the general rule is that trees, and their fruit and produce, such as apples

<sup>1</sup> 1 Washb. Real Prop. 3, and cases cited ; *Drake v. Wells*, 11 Allen, 142 ; *Evans v. Roberts*, 5 B. & C. 829 ; *Douglas v. Shumway*, 13 Gray, 502 ; *Purner v. Piercy*, 40 Md. 212.

<sup>2</sup> *McGregor v. Brown*, 10 N. Y. 117 ; *Carrington v. Roots*, 2 M. & W. 248.

<sup>3</sup> *Weacott v. Delano*, 20 Wis. 514 ; *Drake v. Wells*, 11 Allen, 144 ; 1 Washb. Real Prop. 3.

<sup>4</sup> *Kingsley v. Holbrook*, 45 N. H. 319 ; *Warren v. Leland*, 2 Barb. 613. In *Purner v. Piercy*, 40 Md. 212, it is observed that a distinction is sometimes taken in respect of growing

crops which are *fructus industriales* and growing crops which are *fructus naturales* ; whereby the former are admitted to be chattels and not governed by the Statute of Frauds, § 4, whether the property be transferred before or after severance ; but otherwise, as to the latter. But the rule preferred is, that in general, if the products of the earth be sold specifically, so as to be separately delivered by the terms of the contract as chattels, the statute does not operate, whether as to *fructus industriales* or *fructus naturales*.

and pears, if hanging on the trees at the time of his death, also hedges and bushes, go to the heirs, and not to the executor or administrator; and this simply because they are part of the real estate, and not chattels.<sup>1</sup> But it would be otherwise with severed timber, fallen fruit, materials piled for fuel, and the like; for this is personal property. A similar distinction applies generally to vegetables.

§ 103. **Emblements; Annual Crops fit for Harvest.** — Annual crops which have been planted by the owner of the soil, if fit for harvest, may, out of favor to mutual intention, acquire the character and incidents of personal chattels, though in general they should first be severed.<sup>2</sup> And there are cases which make crops the subject of sale as chattels, even before they are ripe and ready to be gathered.<sup>3</sup> Such crops, in favor of a creditor, may, under like circumstances, be levied upon as personal property.<sup>4</sup>

§ 104. **Doctrine of Emblements strictly so called.** — What we have said of chattels vegetable may prepare the reader to understand better the strict doctrine of *emblements*, which will occupy our attention for the remainder of this chapter. This doctrine, which concerns growing crops still unsevered, bestows upon certain real property, by legal construction, the character and incidents of chattels personal, by applying in effect a severance which would have taken place but for unforeseen contingencies beyond the control of a person who expected to sever, and to hold the severed property as his own. Here too, as it seems to us, the legal purpose is that of liberally and beneficially aiding the reasonable and the presumed intention of the parties concerned, as in the other

<sup>1</sup> Swinb. pt. 7, § 10, pl. 8; 1 Wms. Ex'rs, 668.

<sup>2</sup> Evans v. Roberts, 5 B. & C. 829; Jones v. Flint, 10 A. & E. 753. See Davis v. McFarlane, 37 Cal. 634; Kingsley v. Holbrook, 45 N. H. 319.

<sup>3</sup> Ib.; Sainsbury v. Matthews, 4 M. & W. 343; Craddock v. Riddlesburger, 2 Dana, 206. But see Emerson v. Heelis, 2 Taunt. 38. See Tripp v. Hasceig, 20 Mich. 154, which consid-

ers the case of unsevered crops as affected by a conveyance of the premises.

<sup>4</sup> Heard v. Fairbanks, 5 Met. 111; Stambaugh v. Yates, 2 Rawle, 161. Growing crops are not "personal chattels" under the English Bills of Sale Act, 17 & 18 Vict. c. 36. Brantom v. Griffiths, 2 C. P. D. 212; s. c. 1 C. P. D. 349.

instances already noticed. The rule is, that a tenant for life has, as also other tenants of estates of uncertain duration, the right of *emblements* or profits of the crop, "*emblavence de bled*," which he takes on the termination of his estate, or which, if he is dead, his executors or administrators take; partly, perhaps, "to compensate" (as they say) "for the labor and expense of tilling, manuring, and sowing the land."<sup>1</sup> The doctrine of emblements is borrowed from the feudal law, whereby, if a tenant for life died between the first of September and last of February, the lord took the profits of the whole year with the reversion; while if he died between the first of March and the last of August, the heirs of the tenant received the whole.<sup>2</sup> As the common law strongly encouraged husbandry, we may regard the right of *emblements* as founded upon such a policy (in connection, as we have intimated, with upholding the presumed mutual intent of parties) rather than the rule of a compensation, which, one readily sees, would not thus be measured with exactness.

The doctrine of emblements prevails both in England and the United States at this day. The principle is, that where a tenant sows and works upon the land, with the expectation of gathering the harvest, no sudden and unlooked-for termination of his estate, either by the act of God, or through the misconduct of his lessor, should deprive him or his representatives of the fruits of his labor.<sup>3</sup> It follows then, that to bring a tenant of lands within this principle: *first*, he should have expended labor upon the crop; *second*, his estate should have terminated unexpectedly, and without fault on his part.

§ 105. Doctrine of Emblements; Labor upon Crop required.

— As to the first point, we find that the law draws a distinction between such vegetable products as are the annual results of agricultural labor, and such as are not. Accordingly crops of corn, peas, beans, tares, hemp, flax, melons, potatoes, and the like, are enumerated as among the subjects of emble-

<sup>1</sup> 1 Wms. Pers. Prop. 17, and 6th Eng. ed. 670; 4 Kent Com. 73, notes; 1 Washb. Real Prop. 101 et 110.  
*seq.*; 2 Bl. Com. 122; 1 Wms. Ex'rs, <sup>2</sup> *Ib.*

<sup>3</sup> *Ib.*

ments, yielding an annual profit produced by labor; whilst timber, fruit-trees, grass, and clover, which do not repay within a single year the labor by which they are produced, are excluded from the operation of this rule.<sup>1</sup> Such artificial grasses as are annually renewed seem to fall within the description of emblements.<sup>2</sup> And, by way of exception to the general rule, hops are made the subject of emblements, because, though produced from permanent roots, they require yearly culture and manuring to produce at all; and upon the same principle other kinds of crops might also be accepted in these days of scientific farming. The general rule is, that emblements can only be claimed in respect of crops which ordinarily repay the labor by which they are produced within the year in which the labor is expended; though in extraordinary seasons they may be delayed beyond that period.<sup>3</sup> And, of course, these must be crops which grow not spontaneously, but by the industry of man.<sup>4</sup>

To illustrate this principle somewhat further: If I plant a fruit-tree, neither the annual fruit nor the tree itself can be the subject of emblements. For the fruit is borne without my annual labor; and when I planted the tree, I did so presumably, not in contemplation of present profit, but for future enjoyment, that the labor once bestowed might benefit others if not myself.<sup>5</sup> Nor can timber trees be grubbed up for the benefit of the party whose estate terminated; for the year's supply does not correspond with the year's industry.<sup>6</sup> The case of trees planted by nurserymen with an express view to chattel sale may be mentioned as an exception, as we have already indicated.<sup>7</sup> Grass is not sown every year, and as the improvement cannot be distinguished from the natural product, neither can I make this the subject of emble-

<sup>1</sup> Wms. Pers. Prop. 17; 1 Washb. Real Prop. 102; Com. Dig. Biens, G.; 2 Bl. Com. 123 n.; Evans v. Roberts, 5 B. & C. 832, per Bayley, J.; Co. Lit. 55 b.

<sup>2</sup> 2 Bl. Com. 123, Sharswood's n.; Graves v. Weld, 2 Nev. & M. 725.

<sup>3</sup> Co. Lit. 55 b.

<sup>4</sup> Graves v. Weld, 2 Nev. & M. 725; 1 Wms. Ex'rs, 670.

<sup>5</sup> 2 Bl. Com. 123; 1 Wms. Ex'rs, 672.

<sup>6</sup> Ib.; Co. Lit. 55 b.

<sup>7</sup> Penton v. Robart, 2 East, 90; Lee v. Risdon, 7 Taunt. 191; *supra*, § 100.

ments, although the supply may have been increased by my cultivation.<sup>1</sup>

Planting is an essential element in most claims of emblements. The crop must have been actually planted during the life of the tenant; and no degree of preparation of the ground will give to one the fruits of seed which another has planted after the determination of his tenancy.<sup>2</sup> So the crop claimed must be the crop which was growing at the end of the term, and only that one; even though it does not sufficiently compensate for the industry bestowed, and another crop springs up afterwards.<sup>3</sup> But the right to emblements does not require that the land be cultivated according to rules of good husbandry; for any loss by bad cultivation would be the tenant's own.<sup>4</sup>

§ 106. *Dootrine of Emblements; Unexpected Termination of Tenancy without Fault.*—As to the second point: namely, that the tenant's estate should have terminated unexpectedly and without fault on his part. If a tenant were allowed to take the crops where he knew before planting that the estate would terminate before they were ripened,—the general rule being, that control of the incidents ceases with control of the freehold,—or where he chose to terminate the estate, the law of emblements would be one of favor instead of fairness. But where an estate is suddenly brought to an end by the act of God, or through the misconduct of the lessor, the lessee or his legal representatives may rightfully claim emblements.<sup>5</sup> Nor is suddenness and unexpectedness of termination applied in any such sense as to exclude the claim where the land was sowed when the tenant was in ill health and his early death seemed imminent.<sup>6</sup> The executor or

<sup>1</sup> Gilb. Ev. 215, 216; 1 Wms. Ex'rs, 672; *Evarts v. Inglehart*, 6 Gill & J. 188; *Evans v. Hardy*, 76 Ind. 527.

<sup>2</sup> 1 Washb. Real Prop. 103, and cases cited; *Stewart v. Doughty*, 9 Johns. 108; *Price v. Pickett*, 21 Ala. 741.

<sup>3</sup> *Graves v. Weld*, 5 B. & Ad. 105; 2 Nev. & M. 725.

<sup>4</sup> *Bradley v. Bailey*, 56 Conn. 374.

<sup>5</sup> 1 Washb. Real Prop. 103; 1 Wms. Ex'rs, 673; *Debow v. Colfax*, 5 Halst. 128; *Chesley v. Welch*, 37 Me. 106; *Whitmarsh v. Cutting*, 10 Johns. 360; Bouv. Dict. "Emblements;" 4 Kent Com. 73, 110.

<sup>6</sup> *Bradley v. Bailey*, 56 Conn. 374.

administrator of a tenant for life is entitled to emblements.<sup>1</sup> And so would it be where one was virtually tenant at another's will.<sup>2</sup>

To take illustrations. A woman, who is tenant during widowhood, marries. The tenancy is terminated by her own act, and she has no right to emblements.<sup>3</sup> So, if a tenant abandons the premises, or voluntarily puts an end to the tenancy.<sup>4</sup> And these principles apply in the case of a tenant at will, who, if wrongfully turned out by his landlord before harvest, but not where he abandons his tenancy, is entitled to emblements.<sup>5</sup> A tenant for a term of years, or for a period certain, is not, under ordinary circumstances, entitled to emblements.<sup>6</sup> Nor one who voluntarily surrenders his term.<sup>7</sup> Nor a joint tenant as against the rights of a survivor.<sup>8</sup> Nor a mere tenant at sufferance, nor any one who occupies the lands wrongfully.<sup>9</sup>

The right of emblements applies as between the executor or administrator of the person seised of the inheritance and the heir in some cases, and in others, between the executor or administrator of the tenant for life and the remainder-man or reversioner. When the occupier of the land, whether he be owner of the inheritance or of an estate for life, dies after sowing and before harvest time, his personal representatives take the profits of the crop or emblements.<sup>10</sup> This right

<sup>1</sup> *Ib.*

<sup>2</sup> *Towne v. Bowers*, 81 Mo. 491.

<sup>3</sup> *Hawkins v. Skegg*, 10 Humph. 31; *Debow v. Colfax*, 5 Halst. 128.

<sup>4</sup> 1 Washb. Real Prop. 103, and cases cited; *Whitmarsh v. Cutting*, 10 Johns. 360.

<sup>5</sup> 1 Washb. Real Prop. 103; 5 Rep. 116; *Chandler v. Thurston*, 10 Pick. 205; 1 Wms. Ex'rs, 675.

<sup>6</sup> *Debow v. Colfax*, 5 Halst. 128; *Whitmarsh v. Cutting*, 10 Johns. 360; *Chesley v. Welch*, 37 Me. 106; 1 Washb. Real Prop. 103; 48 Mo. App. 430. But see § 108, *post*.

<sup>7</sup> *Carney v. Mosher*, 97 Mich. 554.

<sup>8</sup> *Owen*, 102; *Rowney's Case*, 2 Vern. 323.

<sup>9</sup> *Doe v. Turner*, 7 M. & W. 226.

In case of ejectment, the question whether the person ejected held under a claim of title appears material. See *McLean v. Bovee*, 24 Wis. 295; *Page v. Fowler*, 39 Cal. 412; *Rowell v. Klein*, 44 Ind. 290. One who is let into possession under a parol contract to purchase is a tenant at will so far as relates to emblements; and, if ejected because the other party refuses to carry out the oral contract, he is entitled to his crops. *Harris v. Frink*, 49 N. Y. 24.

<sup>10</sup> *Swinb.* pt. 7, § 10, pl. 8; *Evans v. Inglehart*, 6 G. & J. 173; *Penhallow v. Dwight*, 7 Mass. 34; *Wadsworth v. Allcott*, 6 N. Y. 64; *Singleton*

extends to tenants by the curtesy, for they are life-tenants.<sup>1</sup> Before the statute of Merton, it was thought that a dowress could neither devise her growing corn, nor cause the crop she had sown to go to her executor or administrator, instead of the reversioner; this statute, however, places her on the same footing as to emblements with other life tenants.<sup>2</sup> The rule extends to every case where the estate determines by act of God, or the act of the law.

If an owner sows the land and then conveys it away, he passes the title to the crop, as well as the soil; and his executors and administrators have no concern in either.<sup>3</sup> The same principle applies to the conveyance of a reversion subject to an existing particular estate.<sup>4</sup> So, too, emblements pass by a devise of the land; partly because, being a grant, the devise must be taken most strongly against the grantor.<sup>5</sup> Why should the devisee stand on a better footing than the heir? For, as against the heir at law, the emblements go to the executor.<sup>6</sup> It is, after all, only a matter of presumption; and the presumption may be rebutted by words in the will that show an intent that the executor or some legatee shall have the emblements.<sup>7</sup> Once more, if a tenant plants the crop, sells it as a growing crop, and then terminates the estate by his own act, the vendee cannot claim the crop as emblements, for the vendor cannot pass a title greater than his own.<sup>8</sup>

*v. Singleton*, 5 Dana, 92; *Bradley v. Bailey*, 56 Conn. 374.

<sup>1</sup> 1 Wms. Ex'rs, 679.

<sup>2</sup> Stat. 20 Hen. III. c. 2; Co. 2d Inst. 80. See *Haslett v. Glenn*, 7 H. & J. 17.

<sup>3</sup> 1 Washb. Real Prop. 104; 1 Wms. Ex'rs, 674; *Brantom v. Griffiths*, 2 C. P. D. 212; s. c. 1 C. P. D. 349.

<sup>4</sup> *Foote v. Colvin*, 3 Johns. 216; *Burnside v. Weightman*, 9 Watts, 46.

<sup>5</sup> *Spencer's Case*, Winch, 51; *Cooper v. Woolfitt*, 2 Hurl. & N. 122; *Dennett v. Hopkinson*, 66 Me. 350.

<sup>6</sup> *Dennett v. Hopkinson*, 66 Me. 350. A deed of land giving possession expressly at the grantor's death,

gives the grantee the emblements when the grantor dies. *Waugh v. Waugh*, 84 Penn. St. 350.

<sup>7</sup> 1 Wms. Ex'rs, 674; *West v. Moore*, 8 East, 343; Co. Lit. 55 b, *Hargrave, n.* See cases cited in *Cooper v. Woolfitt, supra*; *Rudge v. Winnall*, 12 Beav. 357; *Budd v. Hiler*, 3 Dutch. 43; *Shafner v. Shafner*, 5 Sneed, 94; 119 Ind. 305.

<sup>8</sup> *Debow v. Colfax*, 5 Halst. 128; 1 Washb. Real Prop. 104.

Where a married woman died, leaving land which was worked by her surviving husband and minor children, her heirs at law, there being at the time no administrator ap-



It should also be noticed that the original lessee or tenant for life may pass his claim for emblements to his assignee or sub-lessee; save where he is restricted by the terms of his lease from assigning or underletting his term.<sup>1</sup> Indeed, in some cases the assignee or sub-lessee may claim emblements where the original tenant could not have done so. As, for instance, if a tenant during widowhood should underlet and then marry, she would forfeit by marriage all right to emblements; but the law does not place the sub-lessee in the same predicament, because it was not his fault that she did so. The under-lessee or assignee, it is to be remembered, cannot in general be prejudiced by the acts of his own lessee.<sup>2</sup>

§ 107. **Doctrine of Emblements; Right of taking, how exercised, etc.**—When there is a right to emblements, the law gives a free entry, egress, and regress, as much as is necessary, in order to cut and carry them away. The extent of this right is stated by writers on real property to be this: the tenant or his representative may enter upon the land, cultivate the crop if a growing one, and cut and harvest it when fit; and if interfered with, in the reasonable exercise of this right, by the landlord or reversioner, or if the crop be injured by him, he may have an action for the same.<sup>3</sup> But the landlord or reversioner meantime retains exclusive possession of the premises for all other purposes, and the tenant's right of ingress and egress is strictly limited to the exigencies of the situation. Indeed, some writers suggest (though, as it seems to us, without good reason) that possibly the tenant or his executors might be forced to pay rent of some sort until the crop was gathered.<sup>4</sup>

§ 108. **"Away-going Crops" of Tenants for Years.**—We

pointed, it was held that the crops should go to the husband, subject to an offsetting charge for rent. *Gibson v. Carraker*, 82 Ga. 46.

<sup>1</sup> Lessee of a life-tenant who died was allowed emblements where he had sowed. *Bradley v. Bailey*, 56 Conn. 374.

<sup>2</sup> 2 Bl. Com. 124; 1 Washb. Real Prop. 104, and cases cited; *Bulwer*

*v. Bulwer*, 2 B. & Ald. 470; *Bevans v. Briscoe*, 4 Har. & J. 139. See *supra*, § 36.

<sup>3</sup> 1 Washb. Real Prop. 105; Co. Lit. 56 a; 1 Wms. Ex'rs, 6th ed. 679. See *Hayling v. Okey*, 8 Ex. 531; 81 Mo. 491.

<sup>4</sup> Plowd. Quæries, 239; 1 Wms. Ex'rs, ib.; 1 Washb. Real Prop. 106. And see *Smith Landl. and Ten.* 256.

have thus reviewed the common-law doctrine of emblements, whereby some chattels vegetable, while yet unsevered and unripe, are treated as, in a measure, personal and not real property. We have seen that life-tenants and tenants in general for any uncertain period come within the benefits of this doctrine. But, following the authorities, we have spoken rather cautiously of tenants for terms of years whose estates happen to terminate unexpectedly; and with reason, since such an estate is of itself one for a period certain. A tenant for a term of years *if he should so long live*, may be deemed one for an uncertain period; so that if he die before the lease expires, his personal representatives are entitled to emblements.<sup>1</sup> And, under any lease, the landlord is liable for all damages which ensue from his wrongful act in turning out the tenant. But the covenants of a lease may be examined in order to ascertain the mutual intent; and where a tenant stipulates that, in case of his bankruptcy or insolvency, the landlord may re-enter, and the landlord accordingly does so, it is held that the tenant cannot recover emblements; for he himself, and not the landlord, was at fault.<sup>2</sup> And so may it be even as against the assignee of a lease which expressly makes the right to such crops depend upon the performance of a condition which has not been fulfilled.<sup>3</sup>

Custom, however, often regulates the rights of landlord and tenant, under a term for years, in the matter of emblements; thus establishing a rule for chattels vegetable, similar to what we have already noticed as being the essence of the law of heirlooms. And upon custom is founded the right of the outgoing tenant of a term for years to what is called, in the English courts, his "away-going crop."<sup>4</sup>

<sup>1</sup> Rolle Abr. 727, pl. 2; Co. Lit. 56 a.

<sup>2</sup> *Davis v. Eyton*, 7 Bing. 154; *Smith Landl. and Ten.* 252.

<sup>3</sup> *Farnum v. Hefner*, 79 Cal. 575.

<sup>4</sup> Lord Mansfield says of the custom: "We have thought of this case, and we are all of opinion that the custom is good. It is just, for he

who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease; because it is held to be their fault or folly to have sown, when they knew their interest would

While, too, in this country, the tenant under a lease which is to expire at a fixed time is not, as a rule, entitled to emblements, statutory provisions or local customs are sometimes found to the contrary. In Pennsylvania, New Jersey, and Delaware, for instance, the local custom is declared to prevail of giving the tenant this "away-going crop;" a custom which seems to be somewhat restricted, however, in its operation.<sup>1</sup>

A recent statute in England affects the operation of the doctrine of emblements in that country, taking the right away in certain cases, and allowing the tenant, by way of equivalent, to hold until the expiration of the current year of his term.<sup>2</sup>

§ 109. **Emblements, etc., as concerns Mortgagees and Lien Claimants.**— But the right of the tenant, whether for a term of years or a period uncertain, to "away-going crops," or to emblements, is not so extensive where the lands have been mortgaged. And it has been held in numerous instances by our courts that if a mortgagee forecloses his mortgage, whatever crops are then growing upon the mortgaged premises, if planted after the mortgage is made, become the mortgagee's, whether planted by the mortgagor or by his tenant, free from any claim by such tenant.<sup>3</sup> But a foreclosure after the crops are severed carries no interest to the mortgagee or purchaser.<sup>4</sup> And the right to growing crops is so broad that

expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being altered by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking." *Wigglesworth v. Dallison*, 1 Dougl. 201. See *ib.*, 1 Smith's Lead. Cas. 670.

<sup>1</sup> *Demi v. Bossler*, 1 Penn. 224; *Howell v. Schenck*, 4 Zab. 89; *Templeman v. Biddle*, 1 Harring. 522; *Clark v. Banks*, 6 Houst. 584; 1 Washb. Real Prop. 106; *Smith Landl. and Ten.* 258, notes by Maude and

*Morris*; *Taylor Landl. and Ten.* § 538. Abandonment of the crop and violation of the lease preclude the tenant's right. *Fry v. Ford*, 38 Ark. 246.

<sup>2</sup> 14 & 15 Vict. c. 25, § 1 (1851); *Wms. Real Prop.* 6th ed. 27.

<sup>3</sup> 1 Washb. Real Prop. 106, and cases cited; *Lane v. King*, 8 Wend. 584; *Gillett v. Balcom*, 6 Barb. 370; *Jones v. Thomas*, 8 Black, 428; *Howell v. Schenck*, 4 Zab. 89.

<sup>4</sup> *Buckout v. Swift*, 27 Cal. 438; *Codrington v. Johnstone*, 1 Beav. 520; 50 Mo. App. 136. Even a matured crop not severed has in special instances been protected to

judgment liens are not permitted to interfere with a tenant's emblements ; for where the tenant has hired land subject to such a lien, and planted crops upon them before a sale of the premises is made, he may claim them against a purchaser of the land under the sheriff's sale.<sup>1</sup> It is held, also, that the mortgagor's prior sale of the growing crop on his farm gives to the purchaser a priority over the mortgagee, to whom he afterwards surrenders the farm before a harvest.<sup>2</sup>

§ 110. *Emblements in the Civil Law.*—Chancellor Kent says that the doctrine of emblements, being founded on principles so very reasonable, must have existed at the Roman law in tenancies depending on uncertainty.<sup>3</sup> And he mentions, in this same connection, a question once proposed by Marcellus, whether a tenant for the term of five years could reap the fruits of his labor which arose after the extinguishment of the lease. This question was correctly answered in the negative, inasmuch as the tenant must have foreseen the termination of the lease.<sup>4</sup> While indeed, as we may add, a farmer, at the civil law, whose lease had been interrupted by some event which he ought to have foreseen, was treated as a person willing to run the hazard of all losses thereby suffered, the rule, nevertheless, prevailed, that where he was molested by or through the proprietor, the latter should make good all damages sustained thereby, as well as the profits which might have accrued had the lease continued unbroken.<sup>5</sup> The law of Scotland recognizes the doctrine of emblements, and, like the common law, restricts the tenant's right to those annual fruits which require yearly seed and industry, accounting them to be movable even before separation, from the moment they are sown or planted.<sup>6</sup>

the mortgagor as against the purchaser under foreclosure. *Foss v. Marr*, 40 Neb. 559. As to attachment of a debtor's growing crops by his creditor, see 52 Kan. 478, and citations.

<sup>1</sup> *Bittinger v. Baker*, 29 Penn. St.

66 ; 1 Washb. Real Prop. 106. And see *Jewett v. Keenholts*, 16 Barb. 193.

<sup>2</sup> *Sexton v. Breeze*, 135 N. Y. 387.

<sup>3</sup> 4 Kent Com. 110.

<sup>4</sup> Dig. 19, 2, 9, cited by Kent, *ib.*

<sup>5</sup> 1 Dom. Civ. Law, §§ 515, 517.

<sup>6</sup> 2 Burge Col. & For. Laws, 9.

## CHAPTER VI.

## FIXTURES.

§ 111. **Fixtures the most Important of Exceptional Classes** — The remaining species of personal chattels of an exceptional or bordering character to be considered is that of *fixtures*. This is the most important of all ; for while heirlooms and emblements, or chattels vegetable, give rise to little controversy in our courts, the law of fixtures undergoes a constant discussion. So numerous and so conflicting are the cases which involve disputed points under this head, that we shall better occupy our time in separating the subject into its proper divisions, and studying out the elementary principles, than in ranging side by side the hundreds of English and American precedents, seemingly in conflict, which are to be found in the reports, and which multiply with every year. For it must be understood at the outset that decisions as to fixtures, applying, as they do, legal principles to matters of science and art, blend law and fact in close proportions, and constitute a collection of judicial verdicts, reaching from century to century, more than anything else. We have a catalogue of miscellaneous things — machinery, kettles, furnaces, salt-pans, and the like — to attest the progress of architecture and the useful arts rather than of jurisprudence.

§ 112. **Origin of Fixtures ; Definitions.** — The very word “fixtures” is of doubtful meaning, though we use it constantly. It is of modern origin, and not to be found in the ancient law-books at all.<sup>1</sup> The old rule was that, if the tenant or occupier of a house or land annex anything to the freehold, neither he nor his representative can afterwards take it away, upon the maxim *quicquid plantatur solo, solo*

<sup>1</sup> See *Sheen v. Rickie*, 5 M. & W. 175 ; *Wiltshier v. Cottrell*, 1 E. & B. 674.

*cedit.*<sup>1</sup> But as society progressed, and tenants for lives or for terms of years began to affix valuable and expensive articles to the freehold, either for their more convenient or luxurious occupation, or for the purposes of trade, the injustice of denying to the tenant or temporary occupier the right to remove them at his pleasure, and deeming them practically forfeited to the owner of the fee by the mere act of annexation, became apparent to all. A new rule sprang up, which both courts of law and equity treated with favor; namely, that the temporary owner or occupier of real property or his representative, might, as against the permanent owner or successor to the soil, disannex and remove certain articles, although annexed by himself to the freehold. These articles have been denominated "fixtures," and it is to such articles that the word is at this day commonly applied.<sup>2</sup>

Fixtures, then, are defined as those personal chattels which a temporary occupier has annexed to the land, and which he or his representatives may afterwards sever and remove against the will of the owner or successor to the freehold.<sup>3</sup> And the practical question as to appendages of this sort is, whether they are to be considered as in this respect part of the real estate, or treated as personal property; for the latter are movable, and the former are not. But some, with a nicer regard for the distinctions of etymology, apply the term "fixtures" quite differently; namely, to those articles which, by being annexed to the real estate, become part of it, so as to be incapable of removal without the owner's permission.<sup>4</sup> In the very definition of this word, then, is found a fruitful source of confusion; and we must try to distinguish between these two opposing meanings as carefully as possible. Indeed, we think it would be as well to designate fixtures simply as those chattels, annexed in a

<sup>1</sup> See Lord Hardwicke in *Dudley v. Warde*, Amb. 113; Lord Ellenborough in *Elwes v. Maw*, 3 East, 51; *Minshall v. Lloyd*, 2 M. & W. 450.

<sup>2</sup> *Per* Martin, B., *Elliott v. Bishop*, 10 Ex. 508.

<sup>3</sup> *Amos & Fer. Fixtures*, 2; *Elwes*

*v. Maw*, 3 East, 38; s. c. 2 Smith's Lead. Cas. Am. Notes, 228; Bouvier's Dict. "Fixtures;" *Sheen v. Rickie*, 5 M. & W. 75.

<sup>4</sup> See *Hill Fixtures*, 2d ed. 14, 15, and numerous cases cited, chiefly American.

manner to the ground, concerning which the right to remove might be in controversy between the temporary occupier or his representatives and the owner of or successor to the freehold.

§ 113. **Character of the Annexation to Land.** — The primary consideration, as to a fixture, is that of the physical affixing or annexing to the freehold. What is an annexation to land sufficient to bring a chattel within the rule of fixtures? For, manifestly, if I as a tenant set tables and chairs and other furniture in a house, I have the right to take them away at the end of my term, because they were chattels personal, first, last, and always. But if I build a cooking-range, or insert an iron safe into the walls, it is otherwise; and the doctrine of fixtures may be invoked to determine between the landlord's rights and my own. The object and purpose of the annexation ought to be considered in all cases of fixtures; and we shall see in the course of our present investigation that the law is more or less liberal, according as it appears that the chattel was affixed for purposes of trade, for purposes of ornament, for domestic purposes, and so on.

In order to constitute annexation, within the rule of fixtures, it is necessary that the article in question be let into or united with the land, or to substances previously connected therewith. It is not enough that it has been laid upon the land and brought in contact with it; the law requires more than mere juxtaposition; as, that the soil shall have been displaced for the purpose of receiving the article, or that the article shall be cemented or otherwise fastened to some fabric previously attached to the ground.<sup>1</sup> Thus, in *Culling v. Tuffnal*, a tenant had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not let in; and Lord Ellenborough, commenting upon the case afterwards, observed that these things were not to be considered fixtures at all; meaning, of course, that

<sup>1</sup> 1 Wms. Ex'rs, 6th Eng. ed. 2; Whiting, 16 Ill. 480. A large wagon Amos & Fer. Fixtures, 2; Mather v. in a sugar mill is simply personal Fraser, 2 Kay & J. 536; Cook v. property. 54 Kans. 300.

there had been no original annexation to the soil.<sup>1</sup> But it would appear that whenever a chattel has become perfectly connected with the freehold, either by being let in, or cemented or otherwise permanently united to some erection, it becomes part of the freehold itself.<sup>2</sup> To apply this principle to any particular state of facts is, however, a matter of some difficulty. Distillers' vats, supported upon brickwork and timber, but not let into the ground, and vats standing on frames of wood, have been pronounced mere chattels, by courts both in England and this country, while stills let into the ground are made subject to the law of fixtures.<sup>3</sup> Cisterns, again, though standing on blocks in the cellar, or resting only against the walls, have been subjected to the law of fixtures; yet they are sometimes permitted to be carried away.<sup>4</sup> Portableness and the ready capability of being taken away without injury favor a disannexation.

<sup>1</sup> *Elwes v. Maw*, 3 East, 51; commenting upon *Culling v. Tuffnal*, Bull. N. P. 34.

<sup>2</sup> 2 Smith Lead. Cas. 241 *et seq.*, and American notes; *Hill Fixtures*, 2d ed. 22-24.

<sup>3</sup> *Horn v. Baker*, 9 East, 215; *Reynolds v. Shuler*, 5 Cow. 323; *Burk v. Baxter*, 3 Mo. 207.

<sup>4</sup> *Blethen v. Towle*, 40 Me. 310; *Bainway v. Cobb*, 99 Mass. 457; *Wall v. Hinds*, 4 Gray, 256. And as to a heavy carding machine, see *Deal v. Palmer*, 72 N. C. 582.

Portable hot-air furnaces set in pits prepared for them in the cellar, as though placed permanently, are part of the realty; so, also, pipes leading from the furnaces to the chimney. *Stockwell v. Campbell*, 39 Conn. 362; *Thielman v. Carr*, 75 Ill. 385. Cotton-gin stands, put up after the usual manner, pass as realty. *Richardson v. Borden*, 42 Miss. 71; *Smith v. Odom*, 63 Ga. 499. So with water-wheel and gearing put into a mill for permanent use, *Lapham v. Norton*, 71 Me. 83; or the essential machinery of an ore-bank, *Ege v. Kille*, 84 Penn.

St. 333; cf. *Dobscheutz v. Holliday*, 82 Ill. 371; or any machinery permanent in character and essential to the purposes of the premises, *Green v. Phillips*, 26 Gratt. 752; *McConnell v. Blood*, 123 Mass. 47; 127 Mass. 542; *Stokoe v. Upton*, 40 Mich. 581; 88 Mich. 30; *Lyle v. Palmer*, 42 Mich. 314. See *In re Richards*, L. R. 4 Ch. 630; *Longbottom v. Berry*, L. R. 5 Q. B. 123; 7 C. P. D. 328. This may include a gas-manufacturing machine, *Morrison v. Berry*, 42 Mich. 389; *Johnson v. Wiseman*, 4 Met. (Ky.) 357; 11 N. J. Eq. 84; or fixed and permanent platform scales, *Arnold v. Crowder*, 81 Ill. 56. The manner of attachment and fastening is not always decisive in such cases. *Snedeker v. Warring*, 12 N. Y. 170; 99 Mass. 457.

But "gas-fixtures" screwed upon gas-pipes, mirrors, pictures, &c., are movables. *Jarechi v. Philharmonic Society*, 79 Penn. St. 403; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; *Towne v. Fiske*, 127 Mass. 125; 10 Rich. 135; 33 Penn. St. 522; § 122. See *Connor v. Squiers*, 60 Vt. 680.



§ 114. **Modern Tests with Reference to Fixtures.** — But this incident of annexation to the freehold cannot serve as the

So may be a portable hot-air furnace, with its pipes, under circumstances; as where resting by its own weight on the ground, *Towne v. Fiske*, 127 Mass. 125; or a light or heavy machine, temporarily placed and removable without injury, *Wheeler v. Bedell*, 40 Mich. 693; 41 Mich. 625; 26 N. J. Eq. 563; *Pope v. Jackson*, 65 Me. 162. As to a ferry-boat, chain and buoys, see *Cowart v. Cowart*, 3 Lea, 57.

Much difficulty is experienced in determining the character of articles of machinery, whose removal is sought on principles pertaining to the law of fixtures; and while the doctrines noticed in this chapter are held to apply in such cases, yet the decisions sometimes appear to conflict with one another. Machinery whose permanency is subject to the fluctuating conditions of business, and which may be removed without causing substantial injury, though securely fastened, is usually regarded, both in England and in this country, as personal property. See *Hellawell v. Eastwood*, 6 Ex. 296; *Hill Fixtures*, 31, 63-67; 25 N. J. Eq. 496; *In re Richards*, L. R. 4 Ch. 630; *Murdock v. Gifford*, 18 N. Y. 28; *Crane v. Brigham*, 3 Stockt. 29; *Hill v. Sewald*, 53 Penn. St. 274; 2 Kent Com. 344 and *n.*; 1 Washb. Real Prop. 8; *Swift v. Thompson*, 9 Conn. 63; *Wade v. Johnson*, 25 Ga. 331; 35 Minn. 543; *Fifield v. Farmers' Bank*, 148 Ill. 163. See also cases *supra*. But steam-engines which supply the motive power of machinery, and boilers, being permanent and essential, are rather to be deemed fixtures in most cases; and such articles pass as part of the realty when the owner sells or mortgages the premises. *Ib.*; *Mather v. Fraser*, 2 K. & J. 536; *Climie v. Wood*, L. R. 3 Ex. 257;

*Walmsley v. Milne*, 7 C. B. *n. s.* 115; *Sweetzer v. Jones*, 35 Vt. 317; *Richardson v. Copeland*, 6 Gray, 536. So with a water-wheel and the main gearing of a factory; a cotton-gin; and the saws and cranks of a saw-mill; all of which are held in numerous instances to be fixtures, and not personal chattels. *Linton v. Wilson*, 1 Kerr (N. B.), 223; *Trull v. Fuller*, 28 Me. 545; *Powell v. Monson, &c. Co.*, 3 Mason, 459; *Bratton v. Clawson*, 2 Strobb. 478; *Degraffenreid v. Scruggs*, 4 Humph. 451.

A wooden building standing without cellar on another's land, so that it could be removed without seriously disturbing the freehold, and which was built with the purpose of a potential removal, may be treated by the parties and those affected by notice as personal property. *O'Donnell v. Hitchcock*, 118 Mass. 401; *Central Branch v. Fritz*, 20 Kan. 430; *Fuller v. Taylor*, 39 Me. 519; 67 Mo. 632; *Pennybecker v. McDougal*, 48 Cal. 160. A mutual intent in this respect receives much favor. *Young v. Baxter*, 55 Ind. 188; *Meigs's Appeal*, 62 Penn. St. 28; 41 Conn. 471; 43 Iowa, 466; 25 Kan. 322; 90 N. C. 110. But a mill or other structure, built upon land without the purpose of such removal or proper mutual assent, becomes realty, especially if of a permanent character and imbedded in the soil. *Lapham v. Norton*, 71 Me. 83; *Westgate v. Wixon*, 128 Mass. 304; 108 Mass. 371. And see 65 Mo. 682; 28 La. Ann. 793; *Taylor v. Collins*, 51 Wis. 123; *Kinsell v. Billings*, 35 Iowa, 164; *Lipsky v. Borgmann*, 52 Wis. 256; *Kinhead v. United States*, 150 U. S. 483. As to an ice-house, see 111 Mass. 297; 117 Mass. 235, 471. *Prima facie* all buildings belong to the owner of the land on which they

conclusive test of a fixture; nor can we thus hope to reconcile those numerous cases which proceed upon different meanings

stand, — dwelling-houses especially, 14 Allen, 128; but an agreement giving the right to remove may be express or implied from circumstances. 21 Iowa, 177; O'Donnell v. Hitchcock, and other cases *supra*. Fencing in place is a fixture of the freehold, Emrich v. Ireland, 55 Miss. 390; Russ v. Barker, 4 Pick. 239; Glidden v. Bennett, 43 N. H. 306; Ripley v. Page, 12 Vt. 363; Goodrich v. Jones, 2 Hill, 142; but stone, brick, lumber, and other materials for building, lying about loose or in piles, remain personal property until more completely annexed to the land, Woodman v. Pease, 17 N. H. 282; Wing v. Gray, 36 Vt. 261; Cook v. Whiting, 16 Ill. 480; 15 Ill. 162; 3 Iowa, 220. Manure scattered about or heaped in the course of husbandry is usually treated as part of the soil by the modern cases. Cf. Aleyn, 32, with Fay v. Muzzey, 13 Gray, 53; Plumer v. Plumer, 30 N. H. 558; 11 Conn. 525; 2 Hill (N. Y.), 142; 1 Washb. Real Prop. 6. But while shavings, &c., used or intended for use to fill up marshy ground may be a part of the realty, shavings and slabs suitable for kindling, and intended to be used and removed as such, remain personal property. 48 Wis. 628.

The general rule is, that things personal in their nature, which are fitted and prepared to be used with real estate, and are essential to its beneficial enjoyment, become part of the soil and pass with it under a deed of conveyance, provided they were once annexed to the land, and continue to be so used. But a different principle applies where the parties had agreed that such things should remain the property of the party annexing them. See 1 Greenl. Cruise, 46, and cases cited; 1 Washb. Real Prop. 3, 4, where the doctrine is fully

discussed. Hence, on the one hand, buildings erected on the real estate of another, without his permission, become part of such real estate; and if erected by the husband on his wife's lands, they become hers. Washburn v. Sproat, 16 Mass. 449. But, on the other hand, if I build on another's lands under an agreement that the house shall remain my personal property, the law gives effect to the agreement. 1 Greenl. Cruise, 46, and cases cited; Sudbury v. Jones, 8 Cush. 189; Dame v. Dame, 38 N. H. 429; Bearly v. Cox, 4 Zab. 287; McCracken v. Hall, 7 Ind. 30. Even the subsequent assent of the owner to such erection is held sufficient for this purpose. Fuller v. Tabor, 39 Me. 519. And see Mott v. Palmer, 1 Comst. 564; 1 Washb. Real Prop. 3, and cases cited. But the title to house and land becoming united in one and the same person, the whole property is real estate. See Burk v. Hollis, 98 Mass. 55. And it may be remarked in general, that the mere annexation of an article of the character of a fixture to the freehold of another does not necessarily make it the property of the latter, or subject it to the rule of fixtures; for, if done by his consent, the owner may remove it at any time. Wood v. Hewett, 8 Q. B. 913. A temporary building may be taxed as part of the real estate. 130 Mass. 428.

Engines, cars, and rolling-stock generally of a railroad, continue chattels, though used in connection with the land, according to the better opinion, Williamson v. New Jersey R., 29 N. J. Eq. 311; cf. *ib.* 610; Randall v. Elwell, 52 N. Y. 521; Hoy v. Plattsburgh R., 54 N. Y. 314; but the railroad track permanently laid is part of the realty, Van Keuren v. Central R., 38 N. J. L. 165. The

attached to the word "fixture" itself. The question whether a thing is a fixture or not comes up when some estate or term has ended and the right of taking away is at issue between parties; and, whatever the language of the courts, we find that one article is allowed to be taken away because it is an annexed thing which under the circumstances should be favored, while another may be taken because (there never having been annexation at all) it was always as much a personal chattel as the hat which you lay upon the floor and then pick up again.

The modern tendency is to get rid of all precise definitions which would restrain the word "fixtures" to things actually or firmly affixed to the freehold.<sup>1</sup> And in the United States, the favored doctrine of late years is, that whether chattels are to be regarded as fixtures depends less upon the manner of their physical annexation to the freehold, than upon their own adaptation to the purpose for which they may have been used in connection with the realty;<sup>2</sup> and furthermore upon

rails, spikes, and other materials used in the construction of a railway become annexed to the soil, in the process of such construction; and to these are applied the doctrines of fixtures. *Turner v. Cameron*, L. R. 5 Q. B. 306; *Northern Central R. Co. v. Canton Co.*, 30 Md. 347; 25 Barb. 488; *Strickland v. Parker*, 54 Me. 263; *Galveston R. v. Cowdry*, 11 Wall. 464; *Hunt v. Bay State Iron Co.*, 97 Mass. 279. See § 56 *supra*; 39 La. Ann. 566. As to the rolling-stock, there are some American cases which applied rather artificial rules of construction. See 97 Mass. 279; *Farmers' Loan, &c. Co. v. Hendrickson*, 25 Barb. *supra*; *Palmer v. Forbes*, 23 Ill. 300; *Pennock v. Coe*, 23 How. 117. But see *n.* by Redfield, C. J., in 2 Redf. Railw. 3d ed. 533; *Strickland v. Parker*, 54 Me. 263; *Titus v. Mabee*, 25 Ill. 257; *Farmers' Loan, &c. Co. v. Commercial Bank*, 11 Wis. 207; 1 Washb. Real Prop. 4, 5, and cases cited;

*Minnesota Co. v. St. Paul Co.*, 2 Wall. 644, 645-649; *Williamson v. New Jersey R.*, and other cases *supra*. As to piers and abutments, see *Wagner v. Cleveland R.*, 22 Ohio St. 563. Cf. § 122 as to steam-heating fixtures. As to electric plant see 132 Penn. St. 363; *Capehart v. Foster*, Minn. (1895).

<sup>1</sup> Thus, Baron Parke says that fixtures is "a very modern word, and is generally understood to comprehend any article which a tenant has the power of removing." *Sheen v. Rickie*, 5 M. & W. 175. And see *Coleridge, J.*, in *Wiltshire v. Cottrell*, 1 E. & B. 690.

<sup>2</sup> 2 Smith Lead. Cas. 239, 251, Hare & Wall. notes; *Buckley v. Buckley*, 11 Barb. 43; *Davis v. Moss*, 30 Penn. St. 346; *Trull & Fuller*, 28 Me. 545; *Harkness v. Sears*, 26 Ala. 492; *Wadleigh v. Janvrin*, 41 N. H. 503. See also *Shaw, C. J.*, in *Winslow v. Merchants' Ins. Co.*, 4 Met. 314; 1 Wms. Ex'rs, 6th Eng. ed. 686, *n.*

the actual intention, real or presumed, of their annexation.<sup>1</sup> For, after all, the intention, whether express or inferable with reference to some custom or the common sense of the situation, is here an important element, as in the emblements we have been considering, if not in heirlooms too.

§ 115. **Slight or Constructive Annexation.** — And, in regard to the method of annexation, we may observe further, that some things which come within the rule of fixtures are but very slightly annexed to the freehold. Thus the doors, windows, blinds, and shutters, the locks, bolts, and bars of a house can generally be removed at any time without the slightest damage to the freehold; and yet these usually pass with the land, so that the occupier cannot remove them against the owner's consent. Their fit connection as an incident to the enjoyment of the house comes doubtless into great consideration. Certain heavy articles, on the other hand, like mirrors, pictures, bookcases, and wardrobes, though strongly fastened to the wall by screws, are usually mere chattels.<sup>2</sup> "The difficulty is somewhat increased," says Chief Justice Shaw, "when the question arises in respect to a mill or manufactory, where the parts are often so arranged and adapted, so ingeniously combined, as to be occasionally connected or disengaged as the objects to be accomplished may require."<sup>3</sup>

Instances of slight annexation to the freehold come very closely to what has long been styled *constructive* annexation, of which an instance given in the old reports is that of a man who has a mill, and the miller takes the stone out of the mill to pick it, in order to make it grind better; here, although the stone is severed from the mill, yet it remains

<sup>1</sup> *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Hutchins v. Masterson*, 46 Tex. 551; *Wheeler v. Bedell*, 40 Mich. 693; 84 Mich. 632.

<sup>2</sup> *Park v. Baker*, 7 Allen, 78; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38. But a colossal statue, resting by its own weight on a permanent pedestal, has been treated as a fixture, perhaps with reference to

the pedestal rather than to the statue itself. *Snedeker v. Warring*, 2 Kern. 170. See also 161 Penn. St. 197, as to a monument erected on a cemetery lot.

<sup>3</sup> *Winslow v. Merchants' Ins. Co.*, 4 Met. 314. *Supra*, note, p. 136. See 1 Wms. Ex'rs, 689; *Walsmley v. Milne*, 7 C. B. n. s. 138.

parcel of the mill, and is treated accordingly.<sup>1</sup> This is analogous to the doctrine of constructive severance, of which we have already spoken at some length.<sup>2</sup>

§ 115 *a*. **Purposes of Improvement; Pecuniary Considerations, etc.**—In considering, as we should, the intent with which a chattel was annexed to the realty, pecuniary estimates may aid the criterion. If the annexation was made for the purpose of permanently improving the realty and enhancing its value, the subsequent removal of the thing is not to be favored;<sup>3</sup> and such a purpose may be readily raised against the owner of land, who increases or enlarges the buildings on his premises, or places machinery and appliances in his own mill to carry out the obvious objects of its erection.<sup>4</sup> If, again, the worth of the realty at the date of annexation will be sensibly lessened by removing the thing, as by badly disfiguring the building or injuring the soil, this bears against the right of taking away the annexation, and even against a mutual consent to its removal. But portableness, on the other hand, fitness for a ready and beneficial use elsewhere, and the fact that the thing may be taken away without impairing sensibly the value of the realty, all favor the theory that the parties thus mutually intended, as numerous cases show.

§ 116. **Assent to the Annexation; Act of Severance.**—Chattels affixed to the realty without the consent, actual, implied, or constructive of their owner, we may here add, do not by their annexation become part of the realty so as to divest him of his title.<sup>5</sup> Things rightfully and intentionally annexed may, however, acquire the nature of removable fixtures, or may become *per se* part of the realty. Manifest intention of the parties may give them the one or the other character

<sup>1</sup> *Liford's Case*, 11 Co. 50 *b*. And see *Wadleigh v. Janvrin*, 41 N. H. 503; *Mott v. Palmer*, 1 Comst. 564; *Patton v. Moore*, 16 W. Va. 428.

<sup>2</sup> See *supra*, §§ 4, 100; also next section.

<sup>3</sup> *Foote v. Gooch*, 96 N. C. 265; *Atchison R. v. Morgan*, 42 Kans. 23, and cases cited.

<sup>4</sup> *Fifield v. Farmers' Bank*, 148

Ill. 163. The rights of one who improved, not being the owner of the land, should be more favorably regarded than in case of the owner. See 42 Kans. 23.

<sup>5</sup> *Cochran v. Flint*, 57 N. H. 514; *Globe Mills v. Quinn*, 76 N. Y. 23; *Shoemaker v. Simpson*, 16 Kan. 43. And see *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382.

decisively.<sup>1</sup> But all the parties concerned may expressly agree that things originally personal in their nature shall remain subject to removal where they are so attached to the realty as to be fairly capable of subsequent detachment, and this notwithstanding the detachment be more or less injurious to the thing or to the freehold.<sup>2</sup> Either an express agreement of the parties to this effect, or attendant circumstances which make their mutual intention thus evident, may be held binding upon all who come within scope of the agreement.<sup>3</sup> A fixture may by rightful severance become a chattel once more;<sup>4</sup> but a purely temporary or accidental severance, not intended to be permanent, or the wrongful severance by another, will not divest the thing of its former legal character.<sup>5</sup> Of course, fixtures, under any such rule of intention in the annexation, are distinguishable from such closer things as enter into and form parts of a structure upon the land, such as lumber, stone, shingles, and brick, which are fully incorporated with a building and make an integral part of it.

§ 117. **General Conclusion as to determining the Right to take away.**— Various considerations, then, are to be applied

<sup>1</sup> See 14 N. J. L. 395; *Wall v. Hinds*, 4 Gray, 256; *Strickland v. Parker*, 54 Me. 266; *Perkins v. Swank*, 43 Miss. 349; *Ford v. Cobb*, 20 N. Y. 344. While there is a doubt, the presumption is that the article remains personal property. *Hill v. Wentworth*, 28 Vt. 428.

<sup>2</sup> *Warner v. Kenning*, 25 Minn. 173; *Smith v. Waggoner*, 50 Wis. 155; *Tift v. Horton*, 53 N. Y. 377; *Eaves v. Estes*, 10 Kan. 314; *Meigs's Appeal*, 62 Penn. St. 28; *Kinhead v. United States*, 150 U. S. 483.

<sup>3</sup> *Sword v. Low*, 122 Ill. 487; *Tyson v. Post*, 108 N. Y. 217. See § 124 a.

<sup>4</sup> *Sampson v. Graham*, 96 Penn. St. 405. As, e.g., stoves put away for the summer. *Blethen v. Towle*, 40 Me. 310.

<sup>5</sup> *Williamson v. New Jersey R.*, 29 N. J. Eq. 311; *Patton v. Moore*, 16 W. Va. 428. And see *supra*, § 115,

as to constructive severance. Fencing materials accidentally detached from the fence to which they belonged, held a part still of the freehold. *Goodrich v. Jones*, 2 Hill (N. Y.), 142. And see *Bishop v. Bishop*, 11 N. Y. 123; 9 C. E. Green, 260; *Wadleigh v. Janvrin*, 41 N. H. 503.

As to the rights where an owner consents to the annexation, but not to the change of property, *quære*. But while in such a case, supposing no change of property takes place as between the owner and the person affixing them, still, as to third persons, and for particular purposes, the usual consequences may follow. See 57 N. H. 544, with citations. The right to replevy as personal chattels what a wrong-doer has affixed to the soil as realty is denied in 55 Ind. 470.

in determining whether the right to take away, under the law of fixtures, shall or shall not be granted in a particular case. Thus, the nature of the thing in question; the use to which it is put; its adaptiveness to a temporary or permanent enjoyment of the freehold; the situation of the party making the annexation; the intention of such party, and to some extent that of the owner of the land, too; an intention which is either fairly mutual or sustained by the character of the annexation. The contract of these parties may sometimes aid in solving difficulties of this sort; so may a local custom which both are presumed to have regarded. The probable injury to the freehold in case of a removal, and, on the other hand, the advantages likely to accrue if the thing is suffered to remain, enter also as proper elements into consideration. And, finally, the specific purpose or object of the annexation must be regarded; whether for the purpose of trade, or for agriculture, or for ornament and convenience, or for the general improvement of the estate; or, as sometimes happens, for all these combined. Few decisions, therefore, can be considered of absolute authority in succeeding cases, even where the fixtures are of a similar denomination. Every case depends, more or less, upon its own special and peculiar circumstances.<sup>1</sup>

§ 118. *Situation of Contending Parties; Various Classes.* — The leading principles which relate to the law of fixtures are usually classified according to the situation of the con-

<sup>1</sup> See *Walmsley v. Milne*, 7 C. B. N. S. 115; 1 Wms. Ex'rs, 6th ed. 688; *Wood v. Hewett*, 8 Q. B. 913; *Mather v. Fraser*, 2 Kay & J. 536; *Grady Fixtures*, 12-14; *Hill Fixtures*, 20-29, and cases cited, *passim*; *Crippen v. Morrison*, 13 Mich. 23; *Walker v. Sherman*, 20 Wend. 639; 3 Dane Abr. 156; 2 Smith Lead. Cas. 217. Long-continued localization alone does not make a personal chattel become realty. 31 N. J. Eq. 181. As to permitting oral statements to modify a written contract in determining whether a thing was understood to be a fixture, see 51 Wis. 123. One may by acts

and conduct estop himself from asserting that the things are part of the real estate, as by executing a chattel mortgage thereof. *Corcoran v. Webster*, 50 Wis. 125; *Griffin v. Ransdell*, 71 Ind. 440.

Things fixed in the ground are not personalty in the sense of being a subject of larceny. It is necessary that the act of taking away should not be one continuous act with the act of severance or other act by which the thing becomes a chattel. *Bovill, C. J.*, in *L. R. 1 C. C. 315*. And see *supra*, § 100.

tending parties. And Lord Ellenborough, in the important case of *Elwes v. Maw*, mentions three classes of cases, where disputes may arise: *first*, between heir and executor; *second*, between life-tenant and the remainder-man or reversioner; *third*, between landlord and tenant.<sup>1</sup> Let us consider these classes in order. But questions of this same sort arise in other instances: as between vendor and vendee, mortgagor and mortgagee, and personal representative and devisee.

§ 119. **Right to remove Fixtures as between Heir and Executor.** — And, first, of the right to remove fixtures, as between heir and executor; presuming that the person who owned and annexed the chattels has meantime died. Here the rule obtains with the utmost rigor in favor of the soil, and against the right to disannex and carry away. The heir has been a great favorite of the common law from the earliest times. And Sheppard's Touchstone, one of the most accurate of the old treatises, lays it down that "an executor or administrator shall not have the incidents of a house, as glass, doors, wainscot, and the like, no more than the house itself;" and among such incidents it enumerates "glass windows annexed with nails or otherwise to the windows, the wainscot fixed by nails, screws, or irons put through the posts or walls, tables dormant, furnaces of lead and brass, and vats in a brew and dye house, standing and fastened to the walls, or standing in and fastened to the ground in the middle of the house (though fastened to no wall), a copper or lead fixed to the house, the doors within and without that are hanging and serving to any part of the house."<sup>2</sup> But if the glass be out of the windows, or there is loose wainscot, or doors more than are used that are not hanging, or the like, these things go to the executor or administrator.<sup>3</sup>

The strictness of the ancient rule in this respect was afterwards modified to some extent in the case of fixtures wholly or in part essential to trade. The earliest mentioned instance of this sort is the celebrated but somewhat apocryphal case

<sup>1</sup> 3 East, 38. See 2 Smith Lead. Cas. 240.

<sup>2</sup> *Ib.* 470; Amos & Fer. Fixtures, 154 *et seq.*; Wentw. Ex'rs, 62.

<sup>3</sup> Shep. Touch. 469, 470.



of the cider-mill, tried before Chief Baron Comyns ; nowhere reported, though frequently alluded to in later years. Here it would seem that the mill was deep in the ground and fastened to the freehold ; yet it was held to be personal property ; probably because it was a species of trade fixture. Hardwicke, Kenyon, Ellenborough, and Buller afterwards lent, as it would seem, the additional weight of their names to authority so weighty.<sup>1</sup> But Lord Mansfield, in the case of certain vessels which were used in salt-works, and known as salt-pans, decided in favor of the heir "on the reason of the thing and the intention of the testator." By this decision the cider-mill precedent received a great shock. But a still more fatal blow came when the House of Lords decided the case of *Fisher v. Dixon*, which went up on final appeal within the recollection of lawyers still living. Here the deceased, who had been engaged in working mines, left at his death a valuable property, consisting of engines, colliery utensils, rails, &c., employed in his business. Upon full argument it was decided that the property went to the heir and not the executor.<sup>2</sup> Lords Brougham, Cottenham, and Campbell, all of whom delivered opinions in this case, alluded to the cider-mill precedent, but only to show their contempt for its authority. And the doctrine they laid down was that the encouragement to trade is not applicable to questions ordinarily arising between heir and executor with respect to fixtures.<sup>3</sup> And such may be pronounced the latest English rule for all cases of this nature. In this country the rule is by no means so definitely settled ; but the law in this respect is doubtless quite strict, save where, as in New York, the legislature has interposed on behalf of the executor.<sup>4</sup>

Concerning ornamental fixtures, as between heir and executor, the rule, though anciently strict, has varied some-

<sup>1</sup> See *Lawton v. Lawton*, 3 Atk. 14 ; *Lord Dudley v. Lord Warde*, Amb. 114 ; *Elwes v. Maw*, *supra* ; Bul. N. P. 84 ; *Dean v. Allalley*, 3 Esp. N. P. 11.

<sup>2</sup> *Fisher v. Dixon*, 12 Cl. & Fin.

312. And see *Wood, V. C.*, in *Mather v. Fraser*, 2 Kay & J. 536.

<sup>3</sup> *Ib.*

<sup>4</sup> See 2 Kent Com. 345 and *n.* ; *House v. House*, 10 Paige, 157 ; 2 N. Y. Rev. Stats. §§ 6-8 ; *Fay v. Muzzey*, 18 Gray, 56 ; *Tuttle v. Robinson*, 33 N. H. 104.

what; with, perhaps, an increasing liberality towards the executor. A distinction appears to have been early taken in chancery between pictures and mirrors fastened in the ordinary manner, and such as were so let into the wainscot that the house must come to the heir "maimed and disfigured" by their removal.<sup>1</sup> Furnaces, though purchased with the house, and hangings, though nailed to the wall, were allowed to be taken away in cases decided as long ago as the beginning of the last century.<sup>2</sup> And Lord Hardwicke and others relaxed in favor of ornamental chimney-pieces, tapestry, iron backs to chimneys, and the like, which might be taken without injuring the fabric of the house.<sup>3</sup> But contrary *dicta* are to be found in several modern instances; and the common-law courts seem to have favored the inheritance more than the courts of chancery.<sup>4</sup>

§ 120. **Right to remove Fixtures as between Life-Tenant and Remainder-man, etc.**—Next, of the right to remove fixtures as between life-tenant and the remainder-man or reversioner. Here the law favors the soil rather less, and the representative desiring to disannex rather more. Yet there is little authority for our guidance here, save so far as analogy furnishes the rule.<sup>5</sup>

<sup>1</sup> Cf. *Cave v. Cave*, 2 Vern. 508, and *Beck v. Rebow*, 1 P. Wms. 94; 1 Wms. Ex'rs, 6th ed. 695.

<sup>2</sup> *Squier v. Mayer*, 2 Freem. 249.

<sup>3</sup> See *Dudley v. Warde*, Ambl. 113; *Harvey v. Harvey*, 2 Stra. 1141; 1 Wms. Ex'rs, 6th Eng. ed. 696.

<sup>4</sup> See 2 Smith Lead. Cas. 246, 247; *Winn v. Ingilby*, 5 B. & Ald. 625; *Colegrave v. Dios Santos*, 2 B. & C. 76. A heavy stove connected with brickwork, held to pass to the heir. *Tuttle v. Robinson*, 33 N. H. 104. As to manure produced on the premises and fit for use in the course of husbandry, the heir is favored against the executor, even though the manure be piled and not incorporated with the soil. *Fay v. Muzzey*, 13 Gray, 53. But the manure of a livery stable is rather to be treated as assets, being

more in the nature of merchandise. *Fay v. Muzzey*, *Id.* See also *Snow v. Perkins*, 60 N. H. 493.

<sup>5</sup> Two cases of this sort came before Lord Chancellor Hardwicke; and in both of them he permitted a steam or fire engine, erected in a colliery, to go as assets to the executor of a life-tenant. The "case," he observes, "being between executor of tenant for life or in tail and a remainder-man, is not quite so strong as between landlord and tenant, yet the same reason governs it, if tenant for life erects such an engine." *Dudley v. Warde*, Ambl. 113. And see *Lawton v. Lawton*, 3 Atk. 13. This doctrine has since been commended as sound by Lord Mansfield and others. See *Lawton v. Salmon*, 1 H. Bl. 260, *n.*; *Elwes v. Maw*, 3 East, 54; 2 Smith

§ 121. **Right to remove Fixtures as between Landlord and Tenant.** — As between landlord and tenant, the right to remove fixtures is still further relaxed; and the old rule, that whatever is affixed to the soil belongs to the soil, here admits of numerous exceptions. It is observable that, unlike the former instances, a tenant pays for his occupation and has himself put in the fixtures.<sup>1</sup> Whatever the law allows to be removed in the two former classes of cases may unquestionably be removed in the present class; and now let us see how much more liberally the tenant's right is regarded.

The tenant's right to remove articles annexed for trade purposes was asserted as early as the time of the Year Books.<sup>2</sup> But the earliest positive authority in point is *Poole's Case*, decided before Lord Holt in Queen Anne's reign; which has since been recognized in a series of modern decisions. Here a soap-boiler had set up certain vats, &c., upon the premises occupied by him; and it was held that during the term he might well remove such as he had set up in relation to trade, and this, too, by the common law (and not by virtue of any special custom) in favor of trade and to encourage industry; further, that there was a difference between what the soap-boiler erected to carry on his trade, and what for completing the house, as hearths and chimney-pieces, which last were not removable.<sup>3</sup> This case was followed by many others, which asserted the same general policy in favor of trade, and applied it in a similar manner.<sup>4</sup> Among the later adjudications, in England and this country, to a like result, are to be found those of a baker's oven; salt-pans; factory machines; cider-mills;

Lead. Cas. 245; *Amos & Fer. Fixtures*, 128. But where articles, such as tapestry and marbles, belonging to one tenant for life, remain on the premises detached at his death, the next tenant for life cannot, by attaching them to the freehold, prejudice or affect the rights of his successors. *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382.

<sup>1</sup> Gray, J., in *Bainway v. Cobb*, 99 Mass. 459.

<sup>2</sup> See 2 Smith Lead. Cas. 240, citing 42 E. III. fo. 6; 20 H. VII. fo. 13.

<sup>3</sup> 1 Salk. 368, 2 Anne.

<sup>4</sup> See *Lawton v. Salmon*, 1 H. Bl. 260, n.; *Elwes v. Maw*, 3 East, 54; *Dean v. Allalley*, 3 Esp. N.P. 11; *Fitzherbert v. Shaw*, 1 H. Bl. 528; *Penton v. Robart*, 2 East, 90; 2 Smith Lead.

steam-engines; calenders; platform-scales; a hydraulic press; copper stills erected to carry on the business of a distillery, though fixed to the building; a stone for grinding bark, affixed to a bark mill; iron boilers and tanks upon a brick foundation; and machinery in general which is useful to the tenant elsewhere, and may be removed without serious injury to the premises. And as to buildings, Dutch barns, standing on a foundation of brickwork in the ground; a varnish-house for carrying on a varnish-manufactory, built on a brick foundation, with a chimney; a dye-house bolted into the ground; and even a ball-room resting upon stone posts slightly imbedded in the soil.<sup>1</sup> All these furnish examples of articles well annexed to the freehold, which a tenant has been allowed to carry away, as his trade fixtures (or, as it is sometimes said, personal property), rather than leave them for his landlord to enjoy. Intention, nevertheless, express or implied, is of the essence of all such cases, as elsewhere with reference to fixtures.<sup>2</sup>

But while the tenant may carry away such trade fixtures as are removable without material injury to the freehold, he cannot avail himself of this right so far as to be permitted to restore the premises in a dilapidated and damaged condition. It cannot be "for the benefit of trade" that landlords should be despoiled by their tenants. Lord Hardwicke suggests two maxims: (1) that the principal thing shall not

Cas. 241; *Amos & Fer. Fixtures*, 37 *et seq.*

<sup>1</sup> See *Taylor Landl. and Ten.* 5th ed. § 545, where authorities are fully cited; *Taylor v. Townsend*, 8 Mass. 416; *Talbot v. Whipple*, 14 Allen, 177; *Holmes v. Tremper*, 20 Johns. 29; *Swift v. Thompson*, 9 Conn. 63; *R. v. Otley*, 1 B. & Ad. 161; *Taffe v. Warnick*, 3 Blackf. 111. And see *Walker v. Sherman*, 20 Wend. 636, *passim*. See also *Hill Fixtures*, 2d ed. 30-34; *Finney v. Watkins*, 13 Miss. 291; *Harlan v. Harlan*, 15 Penn. St. 507; *Brown v. Wallis*, 115 Mass. 156; 143 Mass. 108. Steam-engine, machinery, &c., for hauling coal from

mines, allowed to be taken away. *Dobschuetz v. Holliday*, 82 Ill. 371. And see *Holbrook v. Chamberlin*, 116 Mass. 155, where the lessee was permitted to remove counter-shafting, pulleys, hangers, belts, a portable boiler, steam-pipes supported by hooks, &c. Accessories to mining operations, including cheap dwellings for the miners, as well as engines, &c., are allowed to be removed as trade fixtures in *Conrad v. Saginaw Co.*, 54 Mich. 249. See also 70 Wis. 92; *Wiggin Ferry Co. v. Ohio R.*, 142 U. S. 396.

<sup>2</sup> See 41 Conn. 471.

be destroyed by taking away the accessory; (2) that an article must be deemed part of the premises where the premises cannot subsist without it.<sup>1</sup> If, then, a trade fixture cannot be removed by the tenant without the destruction or perhaps the serious mutilation of some important building which is itself part of the freehold, it is held irremovable.<sup>2</sup>

Trade fixtures are not in all cases easily distinguished from agricultural fixtures. Where husbandry is pursued as a business occupation there are several important cases which recognize the exclusive right of the tenant to carry away what he has set into the soil.<sup>3</sup> The case of nurserymen and gardeners we have elsewhere considered.<sup>4</sup> But Lord Ellenborough, disregarding the *dicta* of Lord Kenyon, his predecessor, refused to allow a tenant to take away his farm erections, for the reason that annexations for the purposes of trade should be distinguished from annexations for the benefit of agriculture.<sup>5</sup> The law of agricultural fixtures is therefore left in uncertainty; though we have some aid from legislation, which favors the tillage of land, and tends to establish the law of the tenant's trade and agricultural fixtures on a like liberal footing.<sup>6</sup>

Manure made upon a farm from the consumption of its products and in the course of husbandry is, we have seen,

<sup>1</sup> See *Lawton v. Lawton*, 3 Atk. 16. And see *Elwes v. Maw*, 3 East, 38.

<sup>2</sup> See 2 Smith Lead. Cas. 241; *Wall v. Hinds*, 4 Gray, 270; *Taylor Landl. and Ten.* 5th ed. § 544. See *Foley v. Addenbrooke*, 13 M. & W. 174; *Beers v. St. John*, 16 Conn. 322. It seems a fairer rule that the tenant might remove the thing in such a case, provided he indemnified the landlord against the damage. The fact that he can use the thing advantageously elsewhere favors the right to remove. § 115 a.

<sup>3</sup> Thus, it was decided in the Supreme Court of the United States, in 1829, that a wooden building erected by a tenant with a view to carry on the business of dairyman might be removed by him during the term,

although it was two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney, and was occupied by his family and servants engaged in the dairy business. *Van Ness v. Pacard*, 2 Pet. 140, *per* Story, J. There was some evidence in this case to prove usage and custom, which may have influenced the result.

<sup>4</sup> *Supra*, § 100.

<sup>5</sup> *Elwes v. Maw*, 3 East, 38. And see *Buckland v. Butterfield*, 2 B. & B. 58.

<sup>6</sup> See *Story, J.*, in *Van Ness v. Pacard*, 2 Pet. 137; *Whiting v. Brastow*, 4 Pick. 310; *Taylor Landl. and Ten.* § 548; 14 & 15 Vict. c. 25, § 3 (1851); 2 Smith Lead. Cas. 242.

usually regarded in this country as real estate.<sup>1</sup> But in England, and in some of the United States, the outgoing tenant may carry away manure like any removable fixture.<sup>2</sup> And manure made in a livery-stable belongs to the lessee, and not to the owner of the premises.<sup>3</sup> Manure not made on land in the course of husbandry but as part of a cattle-raising business is personalty.<sup>4</sup>

§ 122. *The Same Subject.* — In some of the old cases the right of a tenant to remove articles set up by him for ornament or convenience is denied.<sup>5</sup> But such fixtures are now clearly removable. Thus, hangings, tapestry, wainscot, chimney-pieces, beds fastened to the ceiling, furnaces, coppers, window blinds and curtains, stoves, cupboards, pumps, temporary partitions, cisterns, sheds, grates, door-plates, coffee-mills, and bells, all these things being useful to the tenant elsewhere, placed on the premises as his own things, and severable with no great difficulty, have been taken by an outgoing tenant with the sanction of the courts.<sup>6</sup> "Gas-fixtures," as they are called, and chandeliers, may be removed likewise.<sup>7</sup> Steam radiators and their valves, connecting with and detachable from the general steam-heating apparatus of a building, follow a similar rule.<sup>8</sup> But as to

<sup>1</sup> *Fay v. Muzzey*, 13 Gray, 53; 2 Kent Com. 346, 347, and *n.*; *supra*, p. 137; *Daniels v. Pond*, 21 Pick. 367; *Goodrich v. Jones*, 2 Hill, N. Y. 142; *Kittredge v. Woods*, 3 N. H. 503; *Lassell v. Reed*, 6 Greenl. 222; *Middlebrook v. Corwin*, 15 Wend. 169; *Parsons v. Camp*, 11 Conn. 526; *Lewis v. Jones*, 17 Penn. St. 262; 1 Washb. Real Prop. 6. See *Gallagher v. Shipley*, 24 Md. 418.

<sup>2</sup> *Ruckman v. Outwater*, 4 Dutch. 581; 1 Wms. Ex'rs, 6th Eng. ed. 689; *Roberts v. Barker*, 1 Cr. & M. 809; *Smithwick v. Ellison*, 2 Ire. 326.

<sup>3</sup> *Plumer v. Plumer*, 10 Fost. 558.

<sup>4</sup> *Snow v. Perkins*, 60 N. H. 493.

<sup>5</sup> 4 Co. 64; *Poole's Case*, 1 Salk. 368. But see *Squler v. Mayer*, 2 Freem. 249.

<sup>6</sup> See *Amos & Fer. Fixtures*, 71-93,

and cases cited; 2 *Smith Lead. Caa.* 242, 243; *Taylor Landl. and Ten.* § 547, and cases cited; *Penry v. Brown*, 2 Stark. N. P. 403; *R. v. St. Dunstan*, 4 B. & C. 686; *Wansbrough v. Maton*, 4 Ad. & E. 884; *Ex parte Quincy*, 1 Atk. 477; *Lyde v. Russell*, 1 B. & Ad. 394; *Peck v. Batchelder*, 40 Vt. 233; *Wall v. Hinds*, 4 Gray, 256; *Hill Fixtures*, 2d ed. 41-45; *Cubbins v. Ayres*, 4 Lea, 329.

Tenant allowed to remove coal-bin, stairway, banisters, closet, &c., placed by him on the premises. *Seeger v. Pettit*, 77 Penn. St. 437.

<sup>7</sup> *Wall v. Hinds*, 4 Gray, 256; 79 Penn. St. 403; *Montague v. Dent*, 10 Rich. 136; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; *Vaughen v. Haldeman*, 33 Penn. St. 522; *supra*, § 113.

<sup>8</sup> *Bank v. North*, 160 Penn. St. 303

substantial additions to the house and permanent erections, it is quite different; and even water and gas pipes laid in the ground, or in the walls; and sometimes floors, doors, and windows,—these being peculiarly adapted to the house and going towards its completion, while of little use elsewhere, compared with the damage which must ensue from their removal,—are withheld from the tenant and remain with the owner of the soil.<sup>1</sup>

Sometimes the articles annexed are themselves of a mixed nature, and may be regarded as combining the qualities of both domestic and trade fixtures.<sup>2</sup> We have already seen that the executor is privileged in respect of ornamental fixtures as against the heir; much more, then, is a lessee for years as against his own landlord. But fixtures which do not fall within the forgoing classes, and which the tenant has erected for the manifest purpose of the permanent general improvement of the premises he occupies, cannot be removed;<sup>3</sup> as where he replaces erections.<sup>4</sup>

Furthermore, the right of removing fixtures may be controlled by local custom or the express contract of the parties.<sup>5</sup> And where the question is between landlord and tenant, we must see whether they have executed a lease, with covenants concerning fixtures.<sup>6</sup> Thus a veranda

<sup>1</sup> See *Philbrick v. Ewing*, 97 Mass. 133; *Gas Co. v. Thurber*, 2 R. I. 15. As to electric arrangements, see 132 Penn. St. 363; *Capehart v. Foster*, Minn. (1895).

<sup>2</sup> As where one who leases a building for a hotel and boarding-house puts in a cistern and sinks, fastened by nails, or set into the floor by cutting away the boards; and water and gas pipes fastened to the walls by hooks and bands, and passing through holes cut in the floor and partitions. See *Wall v. Hinds*, 4 Gray, 256; *Taylor Landl. and Ten.* § 547; *Ombony v. Jones*, 19 N. Y. 234.

<sup>3</sup> Thus, in an English case, where a tenant for years had put up a conservatory on a brick foundation,

attached to a dwelling-house, and communicating with it by windows opening into the conservatory and a flue passing into the parlor chimney, it was held that the building belonged to the freehold. Here the tenant for years had a remainder for life after the death of the lessor, which perhaps accounts for so singular an expenditure on his part; but he unfortunately became a bankrupt, and his assignees carried off the buildings in controversy. *Buckland v. Butterfield*, 2 Brod. & B. 54.

<sup>4</sup> *Felcher v. McMillan*, Mich. (1895).

<sup>5</sup> *Supra*, § 32.

<sup>6</sup> *Taylor Landl. and Ten.* § 549; *Lawton v. Lawton*, 3 Atk. 14, n.; *Amos & Fer. Fixtures*, 92.

erected by the lessee was held to be irremovable, because of the covenant on his part to keep in order buildings and improvements, and yield up the same in good repair at the end of the term.<sup>1</sup> And there are other decisions of a similar character.<sup>2</sup> The landlord sometimes covenants to take fixtures at a valuation at the end of the term.<sup>3</sup> Of course the stipulations of leases greatly vary; and with them the tenant's right to fixtures.<sup>4</sup> In New York it is considered that the acceptance of an under-lease of land "with all the privileges belonging thereto as enjoyed by the outgoing tenant," does not subject the sub-lessee to the obligation of a covenant, in the original lease, to leave all buildings which the lessee might erect during the tenancy.<sup>5</sup> In the absence of special contract the tenant cannot remove fixtures after the termination of the lease by breach of condition and re-entry.<sup>6</sup> A tenant at will may assert a right to remove fixtures.<sup>7</sup>

It should be borne in mind that chattels on the premises do not pass by a lease of the realty alone; and that the covenant for delivering up premises in good condition at the end of the term has no application to personal property.<sup>8</sup> Where the parties to the lease agree that certain articles shall be removable fixtures, their intention takes effect.<sup>9</sup>

<sup>1</sup> Penry v. Brown, 2 Stark. N. P. 355.

<sup>2</sup> Naylor v. Collinge, 1 Taunt. 19; Mansfield v. Blackburne, 8 Scott, 720; Bishop v. Elliott, 11 Ex. 113; Dumergue v. Rumsey, 2 Hurl. & Colt. 777.

<sup>3</sup> Fairburn v. Eastwood, 6 M. & W. 679; Stansfield v. Portsmouth Mayor, 6 W. R. 296; 2 Col. 7, 273.

<sup>4</sup> See West v. Blakeway, 2 M. & Gr. 729; Burt v. Haslett, 18 C. B. 893; Bishop v. Elliott, 11 Ex. 113; Foley v. Addenbrooke, 13 M. & W. 174; Boyd v. Shorrocks, L. R. 5 Eq. 72.

As to rule of damages for removing fixtures, under a covenant to keep in repair, see Watriss v. Cambridge Bank, 130 Mass. 343. See also, as

to right of removal of trade fixtures under proviso in lease, *Ex parte* Glegg, 19 Ch. D. 7; 9 Ill. App. 495; 4 Lea, 329, 676; 130 Mass. 255.

The right of removing machinery from a mill at the end of the term, expressly given by the lease, may imply a right of doing some damage to the building. Hunt v. Potter, 13 Rep. 176.

<sup>5</sup> Ombony v. Jones, 19 N. Y. 234. See § 127, *post*, as to time of removing fixtures.

<sup>6</sup> Pugh v. Arton, L. R. 8 Eq. 626.

<sup>7</sup> Cooper v. Johnson, 143 Mass. 108.

<sup>8</sup> Holbrook v. Chamberlin, 116 Mass. 155.

<sup>9</sup> Booth v. Oliver, 67 Mich. 664.

Shelving put up by an intended



§ 123. **Right to remove Fixtures as between Vendor and Vendee.**—Questions concerning the right to fixtures come up very frequently in these days between vendor and vendee, mortgagor and mortgagee, and personal representative and devisee. The rule is a general one, that, upon a sale of the freehold, any and all fixtures attached to it will pass as between vendor and vendee, unless there is some express provision to the contrary.<sup>1</sup> For here the presumption is strongly against the vendor, who should expressly reserve from sale such articles set up in the freehold as he wishes to remove for himself; since a vendee is not asked to make a purchase of lands blindfold. But in a purchase of premises used for business purposes, express reservation as to fixtures will protect the right to remove them.<sup>2</sup> And mutual intention of the parties may conclude any controversy of this kind.

§ 124. **Right to remove Fixtures as between Mortgagor and Mortgagee.**—As to mortgages, the prevailing rule is, that they pass a similar right to fixtures as in the sale of the land; in either of which cases there is a conveyance exe-

lessee, pending negotiations for a lease which afterwards fell through, may be removed by him. 30 Minn. 66.

<sup>1</sup> 2 Smith Lead. Cas. 247; Hitchman v. Walton, 4 M. & W. 409; 2 Kent Com. 441; 1 Washb. Real Prop. 7; Farrar v. Stackpole, 6 Greenl. 157; Walker v. Sherman, 20 Wend. 636; Kennard v. Brough, 64 Ind. 23; Schemmer v. North, 32 Mo. 206; Lapham v. Norton, 71 Me. 83; Connor v. Squiers, 50 Vt. 680. A factory being sold, its necessary machinery passes too. Green v. Phillips, 26 Gratt. 752. See Colegrave v. Dios Santos, 2 B. & C. 76, per Bayley, J.; Farrant v. Thompson, 5 B. & A. 826; Wood v. Whelen, 93 Ill. 153. As to cotton-gin, &c., between vendor and vendee, see Junkin v. Dupree, 44 Tex. 500; Smith v. Odom, 63 Ga. 499. For a case where an estate for years was, by a conveyance to the lessee, as provided in the

lease, merged in the fee, see Globe Marble Mills Co. v. Quinn, 76 N. Y. 23. Machinery put up for a temporary purpose by another, and easily removable, held not to pass by a conveyance of the land, but to remain a chattel. Bewick v. Fletcher, 41 Mich. 625. So with shelving and counters long used in a store. 82 Iowa, 29. Or platform weighing scales in front of the store. 55 Minn. 91.

That a purchaser who is merely in possession under an agreement for a deed should take heed about annexing fixtures, see Moore v. Vallentine, 77 N. C. 188; Towne v. Fiske, 127 Mass. 125; Lapham v. Norton, 71 Me. 83; Westgate v. Wixon, 128 Mass. 304.

<sup>2</sup> Kirch v. Davies, 55 Wis. 287. As to conditions of sale, whereby the title has not yet passed, see 5 Del. 192; 90 Mich. 425.

cuted by the owner of the soil which ought to state excepted articles.<sup>1</sup> Hence trade fixtures which were upon the freehold at the time of the mortgage pass with the land to the mortgagee.<sup>2</sup> And even those put up afterwards have been brought within the same rule.<sup>3</sup> At the same time the language of the conveyance, whether absolute or in mortgage, may be such, that upon its true construction the vendor or mortgagor will be allowed to remove, mortgage, or dispose of articles set up for trade or other purposes.<sup>4</sup> And he may treat as chattels things placed upon the premises which are clearly such and things which there is no reason to suppose come within the fair intendment of the real-estate mortgage.<sup>5</sup> Upon the whole, evident intention of the parties is regarded with an inclination to favor a *bona fide* mortgagee of the land in cases of doubtful intention. But a mortgage of fixtures already on the premises as personal property, while perhaps operating as a constructive severance as between the parties thereto, is held to be of no force against a subsequent purchaser of the realty without notice of its existence; and such a purchaser will take the land free from the incumbrance created by such chattel mortgage.<sup>6</sup>

<sup>1</sup> *Gawan v. Barclay*, 4 W. R. 81; *Longstaff v. Meagoe*, 2 Ad. & E. 167; *Walmsley v. Milne*, 7 C. B. n. s. 115; *Amos & Fer. Fixtures*, 219. But see *Ex parte Quincy*, 1 Atk. 477.

<sup>2</sup> *Climie v. Wood*, L. R. 3 Ex. 257, and cases cited; *Law Rep.* 4 Ex. 328. See *Mather v. Fraser*, 2 Kay & J. 536; *Longbottom v. Berry*, L. R. 5 Q. B. 123.

<sup>3</sup> *Cullwick v. Swindell*, L. R. 3 Eq. 249; 44 Iowa, 57; 38 Mich. 30; *Lynde v. Rowe*, 12 Allen, 100; 4 Met. 306; *Wood v. Whelen*, 93 Ill. 153; *State Savings Bank v. Kercheval*, 65 Mo. 682; *McFadden v. Allen*, 134 N. Y. 489. But see *Hill v. Sewald*, 53 Penn. St. 271; 19 Penn. St. 71. Cf. 42 N. J. Eq. 218, 700. Appliances of a permanent character in a soap and candle factory are presumed to pass under a mortgage of the premises. 80 Cal. 245. See 34 Fla. 509.

<sup>4</sup> *Waterfall v. Penistone*, 6 E. & B. 866. See, further, 1 Washb. Real Prop. 7, 542, and cases cited; *Walmsley v. Milne*, 7 C. B. n. s. 115; *Burnside v. Turchell*, 43 N. H. 390; *Crane v. Brigham*, 3 Stockt. Ch. 30.

<sup>5</sup> *McConnell v. Blood*, 123 Mass. 47; *Wheeler v. Bedell*, 40 Mich. 693; 16 Hun, 239; 26 N. J. Eq. 563.

<sup>6</sup> *Bringholff v. Munzenmaier*, 20 Iowa, 513; 65 N. H. 242; 86 Me. 541.

In the case of a sale of realty with a mortgage back by way of giving the vendor a lien for deferred payments, the judicial disposition appears to be to favor annexations as existing for the vendor's better security, *Morris's Appeal*, 88 Penn. St. 368; *Central Branch R. v. Fritz*, 20 Kan. 430; but it is highly proper in all such transactions to make both a real and a chattel mortgage by way of full secu-

§ 124 a      NATURE OF PERSONAL PROPERTY.      [PART II.

§ 124 a. **Secret Arrangements: Subsequent Parties without Notice.** — As to subsequent purchasers or mortgagees of land to which another's chattels have been annexed, the rule is that seasonable notice of arrangements which had previously existed for regarding such chattels as removable fixtures, affect them accordingly; for the incumbrance has here entered into their own arrangements.<sup>1</sup> But without seasonable or prior notice such *bond fide* parties for value are protected; and no private arrangement between the owner of such realty and one who has permitted his chattel to be so annexed as to appear physically a part of it, that the thing shall remain the seller's personal property until paid for, can prej-

urity for fixtures. See *Zeller v. Adams*, 30 N. J. Eq. 421; 80 Me. 491.

Title to the realty and fixtures may become united in one person by a purchase subject to an existing mortgage. *Jones v. Chair Co.*, 38 Mich. 92.

Among articles which have been lately regarded as fixtures belonging to the realty for the mortgagee's security, unless reserved in the mortgage, are the following: platform scales fastened to sills, &c., *Arnold v. Crowder*, 81 Ill. 56; machinery, apparatus, &c., of a mortgaged brickyard and saw-mill, 27 La. Ann. 657; machinery added under an option to purchase not complied with, *Hamilton v. Huntley*, 78 Ind. 521; a pump planted in the ground and connected to pipes, 77 Cal. 190; the fastened bar of a saloon, 48 Minn. 67. See also *Smith v. Blake*, 96 Mich. 542. But not an embossing press owned and put in by a lessee of the mortgagor, *Pope v. Jackson*, 65 Me. 162; nor machinery carefully kept apart as personal property, for the security of the chattel seller or mortgagee, *Tift v. Horton*, 53 N. Y. 377; *Eaves v. Estes*, 10 Kan. 314; nor unfastened casks, hogsheds, fermenting tubs, and a copper cooler, used in a brewery. *Wolford v. Baxter*,

33 Minn. 12. And see 40 N. J. Eq. 501; 140 Mass. 21, 416; 162 Penn. St. 435. A mortgage of a machine shop covers machines, pulleys, and shafting, bolted or screwed to the building or to blocks bolted to the building; also essential parts of the machinery, although they can be detached therefrom without injury. But it does not cover machines which are not fastened to the floor, but are supported by their own weight; nor machines which are fastened to benches, although run from the shafting; nor vises screwed to benches, although the benches are nailed to the building. *Pierce v. George*, 108 Mass. 78. And see *Ottumwa Co. v. Hawley*, 44 Iowa, 57. Upon the usual principle as between mortgagor and mortgagee, it is held that an engine and boiler, put up after a mortgage of the premises was given, constitute part of the mortgage security, and cannot be afterwards removed by the mortgagor or his assigns, to the mortgagee's injury. *Roberts v. Dauphin Deposit Bank*, 19 Penn. St. 71. As to an elevator, see 78 Iowa, 279.

<sup>1</sup> *Walker v. Schindel*, 58 Md. 360; *Ingersoll v. Barnes*, 47 Mich. 104; 86 Me. 394.

udice the subsequent purchaser or mortgagee of the premises unaware of it.<sup>1</sup> But purchasers at a judicial sale stand in the stead of the judgment debtors and become affected by intervening rights without notice at all.<sup>2</sup> What appears physically to be personal property, however, may well be protected to the true owner, and a subsequent mortgagee or purchaser of the land has notice from that very circumstance.<sup>3</sup>

Manifestly, in many cases it may depend altogether upon the agreement or the special relation of the parties to the annexation whether or not a chattel detachable from the realty has become an immovable fixture.<sup>4</sup> But while they themselves become estopped in such a case to deny that the property was what they agreed it should be, third parties without notice or assent stand unaffected.<sup>5</sup>

§ 125. **Right of Fixtures as between Personal Representative and Devisee.** — As between personal representative and devisee, the rule is that a testator may devise such fixtures as are severable from the freehold, and which would go to his personal representative to the exclusion of the heir; but if the estate itself be not devisable, things which are attached to it will not pass under a devise of them. Hence, it is held that if a tenant for life or in tail devise fixtures, his devise is void, for he had no power to devise the real estate to which they are incident.<sup>6</sup> It would seem, however, that where a testator had a devisable interest, a devise of the house would pass the fixtures, although not expressly named; unless, indeed, things could be readily considered personal estate, so as to go to the executor.<sup>7</sup> The rights of the devisee of lands against the executor of the devisor would seem, on principle, to be the same as those of the heir in whose place the devisee

<sup>1</sup> Southbridge Savings Bank v. Exeter Machine Works, 127 Mass. 542; Fifield v. Farmers' Bank, 148 Ill. 163. A chattel mortgage, *semble*, does not affect the case. 148 Ill. 163.

<sup>2</sup> Manwaring v. Jenison, 61 Mich. 120.

<sup>3</sup> See 45 Ohio St. 289; 55 Minn. 91.

<sup>4</sup> See Warner v. Kenning, 25 Minn. 173; Robertson v. Corsett, 39 Mich. 777; 27 N. J. Eq. 371; 80 Ala. 103.

<sup>5</sup> Cross v. Weare Co., 153 Ill. 499.

<sup>6</sup> Shep. Touch. 469, 470; 4 Co. 62.

<sup>7</sup> See Colegrave v. Dios Santos, 2 B. & C. 80; 2 Smith Lead. Cas. 248.

stands.<sup>1</sup> The intention of the will is to prevail, however, as in other cases.<sup>2</sup>

§ 126. **Right of Fixtures in Miscellaneous Instances.** — Questions respecting the right to fixtures have also arisen between the assignees of bankrupts and mortgagees, or other parties. Bankruptcy statutes may differ, and decisions of the courts with them. But, generally speaking, the assignees of a bankrupt tenant would be entitled to whatever interest in the fixtures the bankrupt himself possessed.<sup>3</sup>

The same strict rule which holds true as between heir and executor, vendor and vendee, mortgagor and mortgagee, has been applied as between tenants in common on a division.<sup>4</sup> Also between heir or vendee of husband and his widow in respect to the dower premises.<sup>5</sup> Also between debtor and creditor, where the latter levies for debt upon the land of the former.<sup>6</sup> One's rights to remove things annexed to land which he had good reason to suppose his own, but of which he was dispossessed afterwards, by one with superior title, deserve indulgence.<sup>7</sup> And so, too, when, pending some negotiation or honest dispute of title, one annexes his personalty to the other land, with the latter's acquiescence.<sup>8</sup>

§ 127. **Time within which Fixtures should be removed.** — Two important points are observable with regard to the right of removal of fixtures: *first*, the time within which

<sup>1</sup> 2 Smith Lead. Cas. 248. See *Stuart v. Bute*, 3 Ves. 212.

<sup>2</sup> See *Wood v. Gaynon*, 1 Ambl. 395; *Lushington v. Sewell*, 1 Sim. 435. We have seen that, in the case of emblements, a devisee's right is quite favorably regarded, upon the presumed intention of the testator to give the land and all incidental benefits. *Supra*, § 106.

<sup>3</sup> See *Trappes v. Harter*, 3 Tyrw. 603; *Horn v. Baker*, 9 East, 215; *Ex parte Cotton*, 2 M. D. & De G. 725; *In re Richards*, L. R. 4 Ch. 630. Trustee in bankruptcy may disclaim a lease vested in the bankrupt. 7 Ch. D. 127.

<sup>4</sup> *Parsons v. Copeland*, 38 Me. 537. A joint ownership of a chattel protected, notwithstanding annexation to the soil of one of them; their intention being upheld. *Young v. Baxter*, 55 Ind. 188. See, as to treatment of fixtures on dissolution of a partnership, *Seeger v. Pettit*, 77 Penn. St. 437.

<sup>5</sup> *Powell v. Monson Co.*, 3 Mason, 459; 1 Washb. Real Prop. 7.

<sup>6</sup> *Goddard v. Chase*, 7 Mass. 432; *Farrar v. Chauffetete*, 5 Denio, 527.

<sup>7</sup> See 42 Kans. 23.

<sup>8</sup> *Brown v. Baldwin*, 121 Mo. 126; 30 Minn. 56.

they should be removed; *second*, the liability to repair all injuries caused by their removal. As to the first point, the common period of limitation was established as early as the time of Henry VII., so far as concerns landlord and tenant, namely, before the tenant's term expires. So long as the term lasts, or at least before the tenant quits possession, he may take away the fixtures; but if he suffers them to remain on the premises afterwards, they become the property of the landlord or reversioner.<sup>1</sup> Down to Lord Kenyon's time, the tenant's right was considered to be strictly limited to his term. But Lord Kenyon suggested that this rule had its foundation in a presumed abandonment on the tenant's part; which presumption might be overthrown by the fact that he remained beyond the expiration of his term instead of quitting and leaving the fixtures behind him.<sup>2</sup> The rule therefore, as afterwards modified, became, that the tenant might remove fixtures for his term, and for such further period of possession as he held the premises under a right still to consider himself as tenant.<sup>3</sup> The exact meaning of this expression is not quite clear; one may remain over as a tenant at will after his lease expires and thus prolong his right; but certainly an outgoing tenant cannot enter for the purpose of severance and removal after his term has expired, and a new tenant is let into possession besides.<sup>4</sup> It behooves one who holds under a term of years, therefore, to use caution, lest he become deprived of his privilege through his own default; and whether he means to renew the lease and acquire a fresh interest in the premises, or to leave his

<sup>1</sup> Year Book, 20 Henry VII. fo. 13, pl. 24. See Taylor Landl. and Ten. 5th ed. § 551 and notes; Lee v. Risdon, 7 Taunt. 191; Elwes v. Maw, 3 East, 38; Lyde v. Russell, 1 B. & Ad. 394; Pemberton v. King, 2 Dev. 376; Gaffield v. Hapgood, 17 Pick. 192; Preston v. Briggs, 16 Vt. 124; Beers v. St. John, 16 Conn. 322; Hadlick v. Stober, 11 Ohio St. 482; Hill Fixtures, 2d ed. 50-59; Dubois v. Kelley, 10 Barb. 496; 64 Fed. 939.

<sup>2</sup> Penton v. Robart, 2 East, 88.

<sup>3</sup> *Ib.*; Weeton v. Woodcock, 7 M. & W. 14; Lewis v. Ocean Co., 125 N. Y. 341; Morey v. Hoyt, 62 Conn. 542. See Roffey v. Henderson, 17 Q. B. 574.

<sup>4</sup> Leader v. Homewood, 5 C. B. n. s. 546. See Taylor Landl. and Ten. § 551; Mason v. Fenn, 18 Ill. 525; Merritt v. Judd, 14 Cal. 69; Davis v. Moss, 38 Penn. St. 346; Burk v. Hollis, 98 Mass. 55.

fixtures behind, to be bought by the incoming tenant, after he has quitted possession, prudence suggests that he comes seasonably to a distinct written understanding with his landlord, unless custom gives him the right.<sup>1</sup> For the rule appears to be that the lessor takes title to all fixtures which an outgoing tenant leaves without reserving the right of removal.<sup>2</sup>

But where the tenant holds under an uncertain term or contingency, as for life or at will, or upon the happening of a particular event, he or his representative may exercise the privilege of removing fixtures within a reasonable time after his term has ended.<sup>3</sup>

§ 128. **Liability to repair Damages caused by removing Fixtures.** — As to the second point, namely, the tenant's liability to repair all injuries caused by the removal of his fixtures, the court observes in *Foley v. Addenbrooke*: "The only rule we can lay down is, that these lessees had a right to remove them, doing as little damage as possible, and leaving the premises in a state fit to be used for a similar purpose by another tenant."<sup>4</sup> Not only should the article removed be such as can be taken away without the destruction or serious injury of the freehold, but the premises should be left in as

<sup>1</sup> See Taylor Landl. and Ten. §§ 552, 553; *Miller v. Baker*, 1 Met. 27; *Thresher v. East London W. W.*, 2 B. & C. 608.

<sup>2</sup> See, for an instance where this rule was applied notwithstanding the lessor's apparent permission, *Josselyn v. McCabe*, 46 Wis. 591. It is not enough to have merely detached the thing before the term ends. *Stokoe v. Upton*, 40 Mich. 581. See *Clarke v. Howland*, 85 N. Y. 204.

But while the tenant's right to remove a fixture does not usually extend beyond his term or possession, the right may be extended by agreement with his landlord. *Torrey v. Burnett*, 38 N. J. L. 457. And if the landlord agrees to sell the fixture for the tenant's benefit, but fails to do so, the tenant has a reasonable time

to remove it after possession is surrendered. *Ib.*

Where a new lease is accepted with covenants to deliver up in as good condition "as the same now are," &c., the lessee should be careful to have an express reservation as to fixtures already on the premises. *Watriss v. Cambridge Bank*, 124 Mass. 571; *Loughran v. Ross*, 45 N. Y. 792. As to a trustee in bankruptcy disclaiming a lease, see *Ex parte Stephens*, 7 Ch. D. 127.

<sup>3</sup> *Weeton v. Woodcock*, 7 M. & W. 14; *Hafick v. Stober*, 11 Ohio St. 482; *Lawton v. Lawton*, 3 Atk. 13. And see, as to bankrupt, *Stansfield v. Portsmouth*, 4 C. B. n. s. 120.

<sup>4</sup> *Foley v. Addenbrooke*, 13 M. & W. 196, *per* Pollock, C. B. See *Grady Fixtures*, 2d ed. 253.

good plight and condition after removal as before annexation, so far as practicable; and it is generally understood that the party removing must repair the damages sustained.<sup>1</sup> If any unnecessary and wanton damage has been done, and the premises are left in such a state that they cannot be conveniently applied to the same purpose as before, the tenant is liable.<sup>2</sup>

§ 128 *a.* **Rights of Action, etc., in General.**—An action for damages against the aggressor will lie in favor of a mortgagee whose security is impaired by the wrongful removal of things permanently attached which passed under the mortgage; and prior to such removal he may bring a bill in equity to restrain the threatened waste.<sup>3</sup>

§ 129. **Transfer of Fixtures; Various Incidents.**—It is questionable whether the tenant has a complete property in fixtures whilst they are attached to the soil. Except as to his right of removal, these seem to be and to remain part of the realty; and unless this right of removal is exercised within a suitable period, they pass with the land. But the right of removal itself, though of a peculiar nature, partakes rather of the character of a chattel than an interest in real estate. This right may be transferred; or it may be made available by creditors.<sup>4</sup> But, as in landed interests, if the tenant grants or mortgages his fixtures, he cannot afterwards defeat this act by a subsequent voluntary surrender.<sup>5</sup> When rightfully severed, the fixtures become chattels. But meantime trover does not lie for them; nor replevin; nor assumpsit as “for goods sold and delivered.”<sup>6</sup> The rule as respects their

<sup>1</sup> Taylor Landl. and Ten. § 550; Avery v. Cheslyn, 3 Ad. & E. 75; Whiting v. Brastow, 4 Pick. 811; Kirwan v. Latour, 1 Har. & J. 289. See Hare v. Horton, 5 B. & Ad. 715. Sometimes there are statutes on this subject; e.g. 14 & 15 Vict. c. 25, § 3.

<sup>2</sup> Per Pollock, C. B., Foley v. Adenbrooke, 13 M. & W. 199.

<sup>3</sup> Lavenson v. Soap Co., 80 Cal. 245.

<sup>4</sup> See Taylor Landl. and Ten. 5th ed. § 549 and n.; London Loan, & Co. v. Drake, 6 C. B. n. s. 798; Overton v. Williston, 31 Penn. St. 160.

<sup>5</sup> London Loan, & Co. v. Drake, 6 C. B. n. s. 798.

<sup>6</sup> Mackintosh v. Trotter, 3 M. & W. 184; Lee v. Risdon, 7 Taunt. 188; Taylor Landl. and Ten. § 549, n.; McAuliffe v. Mann, 87 Mich. 539. See 128 Ill. 29.



sale on execution is somewhat peculiar.<sup>1</sup> And they are considered subject to liens on the soil to which they may have been attached.<sup>2</sup> In American practice, and especially where the annexation to the realty is very slight, the owner of fixtures may hold the owner of the soil liable for a conversion when the latter refuses to allow him to enter and remove them.<sup>3</sup> Things which are strongly affixed are not attachable as personalty as between the debtor and his creditors.<sup>4</sup>

Facts may establish the waiver, in any case, of a controverted claim to fixtures.<sup>5</sup> And a tenant who has a right to remove certain erections as fixtures at the end of his term may, by remaining under a new lease inconsistent with this right, debar all removal accordingly.<sup>6</sup>

§ 130. **Various Examples as to Things which might appear Real or Personal; Turpentine, Sap, Peat, etc.**—Before passing from the general consideration of property of a mixed description, which has occupied our attention thus far under the leading heads of heirlooms, emblements, and fixtures, we shall do well to notice a few more examples of things which in some respects might appear real, yet in others personal. Turpentine, sugar-maple sap, and the like products of a tree, in a state to be dipped up, are personal and not real property; and this, although the flow is directed into boxes cut in the tree itself; for it has ceased to be part of the tree.<sup>7</sup> Peat cut for fuel, lying on land, is personal property.<sup>8</sup>

§ 131. **Various Examples continued; Buildings on Another's Lands.**—We have observed under what circumstances an erection by mutual assent upon another's land becomes or fails to become part of the real estate and is owned accordingly.<sup>9</sup> The civil law upon this subject appears to have

<sup>1</sup> 1 Arch. Pract. 12th ed. 655; Taylor Landl. and Ten. § 549, n.; Rice v. Adams, 4 Harring. 332.

<sup>2</sup> Gray v. Holdship, 17 S. & R. 418; Schaper v. Bibb, 71 Md. 145. On dissolution of firm, partners may treat fixtures as personal property. Seeger v. Pettit, 77 Penn. St. 437.

<sup>3</sup> See 30 Minn. 56, 59; Walker v. Schindel, 58 Md. 380.

<sup>4</sup> 57 Vt. 432; 70 Cal. 3; 64 Fed. 939.

<sup>5</sup> Foster v. Prentiss, 75 Me. 279.

<sup>6</sup> Hedderich v. Smith, 103 Ind. 203.

<sup>7</sup> Branch v. Morrison, 5 Jones, 16.

<sup>8</sup> Gile v. Stevens, 13 Gray, 149.

See also § 53, *supra*. Old rails, the refuse material of a fence which has been removed, are of course personalty once more. 57 Vt. 641.

<sup>9</sup> *Supra*, p. 136, n.

differed from the common law and to have applied a more equitable principle. For while, according to the common law, a person who, through ignorance of his title, or by mistake, builds upon the soil of another, must forfeit the house, and can claim nothing for the materials or labor he furnished; the civil law under such circumstances made the owner of the soil pay the value of the materials and labor to the builder, or he could not insist upon retaining the house. But the general rule of the civil law was, that, if a person builds upon another's land, the house follows the property in the soil, unless it can be easily removed; while if he builds the house knowingly, he is presumed to have given his materials and labor to the owner of the soil.<sup>1</sup> Even at the common law the presumed dedication of an owner's materials to the owner of the land which in theory deprives the former of his property is so disputed by the facts in some instances that our modern courts disincline to apply the rule of forfeiture to the owner of materials.<sup>2</sup>

§ 132. **Various Examples continued; Pews, Organs, Church Furniture, etc.** — Pews in churches are treated by the Continental jurists as immovable property.<sup>3</sup> So the law of England considers them as a parcel of the freehold; belonging, as it is said, to the incumbent, although the use of them is in those who have the use of the church. And ecclesiastical writers in that country discriminate between parson and parishioners, in determining the right to the materials of seats in various instances.<sup>4</sup> But in the United States, land and materials alike belong usually to the organized society of the church, in the first instance, whose officers sell or let the pews from time to time to individuals; and while, in the absence of statute provisions, pews partake of the nature of realty, they are in some States made personal property

<sup>1</sup> Wood Civ. L. b. 2, c. 3, p. 114. See 1 Washb. Real Prop. 3.

<sup>2</sup> 47 Mo. 297; Atchison R. v. Morgan, 42 Kans. 31.

<sup>3</sup> Voet. De Mob. et Immob. c. 5,

n. 8; Pothier Tr. de la Com. n. 61; 2 Burge Col. and For. Laws, 29.

<sup>4</sup> Amos and Fer. Fixtures, 204; Burn Ecc. Law, vol. 1, tit. Church. See Presbyterian Church v. Andruss, 1 Zab. 325.

by statute.<sup>1</sup> Some controversies of little practical consequence, over the nature of bells, bell-ropes, and organs, are reported in the older books.<sup>2</sup> And it might seem superfluous to say that a stove and pipe in a church are chattels, and not real estate; though furnaces might usually be treated as permanent fixtures.<sup>3</sup> A bell once set up in the belfry of an old church, and afterwards transferred with its framework to the lot where a new church was being erected, and there remaining in regular use for about a year until the tower of the new edifice should be ready for its reception, is constructively held to be part of the realty.<sup>4</sup> And an organ, though usually a chattel, may, when set into a special niche provided for the purpose of giving the church an architectural finish, become a permanent fixture.<sup>5</sup>

§ 133. **Character of Property as Real or Personal; Doctrine of Equitable Conversion.**—Finally, the character of property is frequently determined by the equitable doctrine of conversion. One of the maxims of the chancery courts is, that equity looks upon that as done which ought to be done. As a consequence of this maxim, money directed to be employed in the purchase of land or land directed to be turned into money is in general regarded as that species of property into which it is directed to be converted; either immediately, or at some future time, according to circumstances.<sup>6</sup> Thus, a devise that the land of a testator should be sold, and the money paid over to an alien, has been carried into effect, although under the law an alien could not take real estate.<sup>7</sup> This

<sup>1</sup> See Mass. Gen. Sta. c. 30, § 38; 1 Washb. Real Prop. 9; Buck Eccl. Law, 146, &c.; 3 Kent Com. 402; Church v. Wells, 24 Penn. St. 249; Hodges v. Green, 28 Vt. 358; Baptist Church v. Bigelow, 16 Wend. 28.

<sup>2</sup> See 1 Burn Ecc. Law, tit. Church.

<sup>3</sup> Congregational Society v. Stark, 34 Vt. 243.

<sup>4</sup> Congregational Society v. Fleming, 11 Iowa, 533. See § 115.

<sup>5</sup> Rogers v. Crow, 40 Mo. 91. Settees easily removable and not attached

to the building are chattels. *Ib.* As to the rights of pew-owners in this country, see Buck Eccl. Law, 146 *et seq.*; Newbury v. Dow, 3 Allen, 369; Jackson v. Rounsaville, 5 Met. 127; Presbyterian Church v. Andrus, 1 Zab. 325; Kincaid's Appeal, 66 Penn. St. 411.

<sup>6</sup> See Story Eq. Jur. § 790; Fletcher v. Ashburner, 1 Lead. Cas. Eq. 2d ed. 659 *et seq.*; Craig v. Leslie, 3 Wheat. 577; Houghton v. Hapgood, 13 Pick. 154.

<sup>7</sup> Craig v. Leslie, 3 Wheat. 577.

doctrine of conversion bears especially upon the descent and distribution of property in cases where one would take if the property were real, and another if it were personal. The persons entitled to the property whose conversion is directed are entitled to enforce the conversion, either actually or virtually ; but not a stranger.<sup>1</sup> A like rule sometimes applies in disposing of the surplus produce of real estate sold for certain purposes. For where real estate is directed to be sold under a will, to carry out specified objects, so much as remains of the real estate, or its produce, after making a necessary sale for such objects, goes as real or personal property according to the testator's intention.<sup>2</sup>

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## CHAPTER VII.

### PERSONAL PROPERTY IN EXPECTANCY.

§ 134. **Time of Enjoyment of Personal Property to be considered.** — We have considered in the foregoing chapters the various kinds of personal property. We may now, following

<sup>1</sup> See *Fletcher v. Ashburner*, *supra* ;  
<sup>2</sup> *Spence Eq.* 268, 269 ; *Story Eq. Jur.* § 790.

<sup>2</sup> *Ackroyd v. Smithson*, 1 *Lead. Cas. Eq.* 2d ed. 690 *et seq.* ; *Smith Manual Equity*, 9th Eng. ed. 161. And accordingly, in a late case, where A. by will, after sundry legacies, gave all the residue of her estate, real and personal, to C., and empowered her executor to sell her real estate ; and, the personal estate being insufficient to pay her debts and legacies, he did so ; and upon a final adjustment of his accounts a surplus in money remained ; it was held that this surplus was to be treated as real and not as personal property. C. had died a few days after A. ; so this surplus went to C.'s heirs, and not to his administrator.

*Cook v. Cook*, 5 C. E. Green (N. J.), 275. Real estate which has been added to partnership stock is often treated as though converted into personal property. See *Pars. Partn.* 369 *et seq.*

Amos and Ferard's work on *Fixtures* is well known. A more recent text-book of good repute on this subject is M. D. Ewell's. But while the reader may find elsewhere more authorities cited upon this perplexing subject, it is believed that the leading principles announced are sufficiently stated and vouched for in the foregoing chapter. All such controversies involve mixed questions of law and fact ; and hence multiplied citations only lead to mental confusion.

the example of the common-law writers on real estate, treat of personal property with reference to the *time of enjoyment*.

§ 135. **General Doctrine of Interests; Immediate or Expectant.** — Blackstone lays it down that estates, with respect to the time of enjoyment, are either in *immediate possession*, or in *expectancy*; that estates in expectancy are created at the same time and are parcel of the same estates as those upon which they are expectant; and that expectant estates are to be subdivided, first, into the *remainder*, — which is an estate limited to take effect and be enjoyed after another particular estate is determined, — and, secondly, into the *reversion*, which is the residue of an estate left in the grantor and his heirs, to commence in possession after the determination of some particular estate granted. Where a man grants by one and the same instrument lands to A. for twenty years, and then to B. and his heirs forever, B.'s interest is a remainder; where lands are granted to A. for life, or to A. and his male issue, and A. dies or there is a failure of male issue, there is a reversion, by operation of law, to the grantor, to be again disposed of at pleasure.<sup>1</sup> In short, while estates or interests are said to be *in possession* when the person having the estate or interest is in actual enjoyment of that in which such estate or interest subsists, an estate or interest is *in expectancy* when the enjoyment is postponed, although the estate or interest has a present legal existence. The doctrine of expectant estates, as applied to lands and tenements, gives rise to some of the most curious, not to say the most subtle and perplexing, distinctions of legal science.

§ 136. **How far this Doctrine applies to Personal Property.** — How far does this doctrine apply to personal property? Anciently it had no application whatever. There was no such thing legally possible as an expectant interest in chattels; and this because of the perishable nature of such property, its insignificance, and its movable characteristics. Houses and lands would remain comparatively unchanged through a succession of owners; but animals died, furniture and garments wore out, and money required to be kept in

<sup>1</sup> See 2 Bl. Com. lec. 11; Co. Lit. 142, 143.

constant circulation ; so that the ownership of these latter things was of little consequence unless immediate, complete, and exclusive. So, too, a party in expectancy of lands, or those guarding his interests, might watch the party in possession, and check all attempts on his part to commit waste ; and however much the incidents might have been damaged, the freehold remained intact. But who would undertake to trace single chattels through a series of years, when the possessor might destroy, secrete, or remove them beyond the reach of remainder-men and reversioners ? The temporary occupation of lands, the collection of rents, the gathering of annual crops, — these constituted a substantial usufructuary enjoyment of property in the eyes of men. But in an age when capital and income were unknown, and the loan of money for recompense was deemed an offence, the use of movable property given to one with a remainder over, would have been worth either too little or too much to the remainder-man, according to the measure of his predecessor's conscience.

While, therefore, our English ancestors, being stimulated by the desire to control freehold property and to transmit hereditary titles to unborn offspring, favored from early times the creation of estates, more or less valuable, and for longer or shorter periods, in lands, so that one might have an immediate interest, while another's was by postponement, the law refused to sanction an application of the same principle to goods and chattels.

But the rule which thus discriminated between things real and things personal began to relax as these two species of property assimilated more closely, in value and importance, to one another ; and in modern times, when mercantile enterprise has developed new sources of wealth and new species of permanent investments, the force of the old objections to limitations of personal property is well-nigh spent ; and failing the reasons, the rule must fail. If real estate is valuable to-day, so is personal property ; if the one can be preserved intact, so to a great extent can the other ; if the enjoyment of rents and growing crops for years or for life is valuable,

not less so is the receipt of interest and dividends for a like period. Hence we shall find that the doctrine of interests or estates in expectancy has come at last to be applied with much the same force to personal as to real property; though not absolutely so, since the two systems were built up apart, and each has its essential and peculiar characteristics.

§ 137. **As to Personal Property; Interests, Immediate or Expectant.** — Let us bear in mind that the expectant estate, at common law, whether by way of remainder or reversion, takes effect after some particular estate which was created at the same time — such as an estate for life or for years — has determined. Thus, if I have a piece of land, I may grant it to A. for twenty years, then to B. and his heirs forever; or, granting it to A. for twenty years and nothing more, the law implies that the reversion is in me and my heirs. A. in such case has the particular estate; while B. by way of remainder (or I, or my heir again, by way of reversion) has the estate in expectancy. So much for real property. Now, to take the case of personal property. If I have one hundred shares of bank stock, and give the income to A. for twenty years or for life, then the principal to B., the interest of A. is particular, while that of B. is in expectancy. Whether the property, then, be real or personal, and whatever the technical terms employed to distinguish them, two interests in the property are created simultaneously: the one, the particular interest, to take effect presently; the other, the interest by way of remainder or reversion, which is to take effect hereafter.

But while lands are only the subject of tenure at the common law, and held by estates therein, not owned, personal property is essentially the subject of absolute ownership. This fundamental difference in theory has already been pointed out.<sup>1</sup> To say, then, that goods and chattels may be settled or limited by the creation of *estates* in them, would not be literally correct. The use of the terms *estates for life*, *in remainder* and *in reversion*, in the present connection, must, therefore, be rather by analogy than in a literal sense. We

<sup>1</sup> *Supra*, § 6.

should speak rather of *interests* in personal property. And in many cases a striking difference will be found in the effect of the same limitation, according as its application, whether to real or to personal property.<sup>1</sup>

§ 138. **Expectant Interests in Personalty under a Will.**—The common-law rule, then, was anciently that, if any chattel were assigned to A. for his life, A. would at once become legally entitled to the whole, inasmuch as no estate could be created therein. But an exception was afterwards made in favor of chattels real; for we find in *Manning's Case*, where a person possessed of a farm for the term of fifty years devised and bequeathed the lease to B. after the death of his wife, giving her the use and occupation of the farm during her natural life, that it was held that B. should have the term after the life-interest had expired; by way, however, of executory devise, and not by way of remainder.<sup>2</sup> Limitations of this sort by will, therefore, were deemed proper so early as the reign of James I.<sup>3</sup> Yet the early cases proceeded upon the ground of indulgence; for the argument was that a last will and testament might create an interest after death which one could not pass in his lifetime by gift, grant, or conveyance; nay, that even this favor could only be shown, when, as in the above instance, merely the use of the chattel, and not the chattel itself, was given to the first legatee.<sup>4</sup> From chattels real the same doctrine appears to have extended to chattels personal, under like restrictions; and it became a rule that limitations of goods and chattels generally, by way of remainder, after a bequest for life, were good; the property being supposed to continue meantime in the testator's executor, and the use only of the chattel being given to the first legatee.<sup>5</sup>

Chancery pursued this doctrine for a time; but a distinction so artificial being found unsatisfactory, it was at last thrown aside, and a broader rule was announced, such as

<sup>1</sup> See Wms. Pers. Prop. 5th Eng. Co. 46; Child v. Baylie, Cro. J. 459; ed. 236. <sup>2</sup> Kent Com. 352.

<sup>3</sup> 8 Co. 94 b.

<sup>4</sup> See 2 Bl. Com. 398.

<sup>5</sup> *Ib.* And see Lampet's Case, 10

<sup>5</sup> *Ib.*; Eq. Ca. Abr. 360. See



might seem better calculated to enforce the intention of a testator and do more exact justice between the objects of his bounty. Before the close of the seventeenth century it was clearly settled that, if a person devise and bequeath goods to A. for life with remainder over to B., it is a good limitation to B., and this whether the goods or the use of the goods were given to A. by the terms of the will.<sup>1</sup> For equity found the civil and canon laws available in this respect, which construe the use of the thing and not the thing itself to pass, where the first interest is for a limited time.<sup>2</sup> In all such cases A. has merely a life interest; while B. has a vested interest by way of remainder, which he may dispose of at his pleasure; and chancery compels the person to whom courts of law may have awarded the legal interest to make good any such disposition.

§ 139. **Expectant Interests created in Personality by Deed of Trust, etc.** — Nor is it longer necessary that limitations of this sort should be my will; they are equally good when made by deed of trust.<sup>3</sup> Settlements by way of remainder, whether of things real or personal, are not very common in this country; the genius of our institutions being somewhat opposed to fettering the transmission of property. But in England the deed of trust comes frequently into requisition for creating and preserving family entails. Whenever a settlement of any kind of personal property is to be made, the property is assigned to trustees, in trust for A. for his life, and after his decease in trust for B., and so on. The assignment to the trustees vests in them the whole legal property at law; while in equity the trustees will be compelled to pay the entire income to A. for his life, and after his decease to B., and so on until the trusts are completely

Wms. Pers. Prop. 5th Eng. ed. 237-239; Fearne Cont. Rem. 402, 404.

<sup>1</sup> Freem. 206; 2 Kent Com. 352; 2 Bl. Com. 398.

<sup>2</sup> Hyde v. Parrat, 1 P. Wms. 1. Subject to the rule against perpetuities (to be noticed *post*) one may create successive life or temporary interests by his will. See Grylls's

Trusts, L. R. 6 Eq. 589. As to the bequest in expectancy to one named as executor, see 4 Ch. D. 841.

<sup>3</sup> See 2 Bl. Com. 398, Archbold, *n.*; Fearne Cont. Rem. 406; Child v. Baylie, Cro. J. 459; Porter v. Tourney, 3 Ves. 311; 2 Kent Com. 352; Bill v. Cureton, 2 Myl. & K. 512.

fulfilled.<sup>1</sup> Settlements of this sort are to be found in some of our older States; and whether common in practical application or not, the doctrine that personal property may be limited by way of remainder after a life interest created at the same time is fully recognized in the United States as well as in England, especially as regards testamentary dispositions.<sup>2</sup> It has been a matter of dispute whether deeds of this sort (as contrasted with wills) can be upheld unless expressed to be in trust.<sup>3</sup> However this may be, equity, as is well known, would reluctantly suffer any trust to fail for want of a trustee to support it. And in instruments which settle goods and chattels to the wife's separate use, the court supports the trust by making the husband himself, if no other be found, the trustee, and charging him with its faithful execution.<sup>4</sup>

§ 140. **Exception as to Perishable Chattels.**—But the doctrine of expectant interests in personal property applies in strictness only to those species of chattels which might be designated as of a durable nature. Perishable chattels constitute an exception to the rule. Thus, if wine, corn, hay, and other articles for food and drink, whose use consists presumably in their consumption, be bequeathed to one for life, with limitation over to another by way of remainder, it is held that the limitation over cannot take effect, even though the first-named person should die in the testator's life.<sup>5</sup> The reason given is one of construction: that the gift or bequest of such articles for life must have been intended as an absolute gift, since one could not use without using up the property.<sup>6</sup>

<sup>1</sup> Wms. Pers. Prop. 5th Eng. ed. 239. For an estate *pur autre vie*, see 18 Ch. D. 624.

<sup>2</sup> See cases *supra*; 2 Kent Com. 352, 353, and *n.*; Moffat v. Strong, 10 Johns. 12; Langworthy v. Chadwick, 13 Conn. 42; Healey v. Tappan, 45 N. H. 243; 85 Ill. 119.

<sup>3</sup> Betty v. Moore, 1 Dana, 237; Morrow v. Williams, 3 Dev. 263. *Contra*, Powell v. Brown, 1 Bailey, 100.

<sup>4</sup> See Schouler Dom. Rel. §§ 182, 185; Bennett v. Davis, 2 P. Wms. 316; Wallingsford v. Allen, 10 Pet. 583.

<sup>5</sup> Andrew v. Andrew, 1 Coll. 690.

<sup>6</sup> Randall v. Russell, 3 Meriv. 194; Evans v. Inglehart, 6 Gill & J. 171; Henderson v. Vaulx, 10 Yerg. 30; Merrill v. Emery, 10 Pick. 507; German v. German, 27 Penn. St. 116; Perry Trusts, § 547; Tyson v. Blake,

But if we were to extend that principle very far, we should be likely to frustrate instead of carrying out a testator's wishes, in many instances. There are various kinds of personal property, of a more or less perishable nature; and the word "durable" must be used with reference to movables in a relative rather than an absolute sense. Tools and implements, garments, ships, furniture, and books, are all worn out in time, though their use does not so completely necessitate their consumption as in the case of articles for food and drink. Leaseholds and annuities, too, grow less valuable by the lapse of time. Equity does not disregard the testator's wishes, if reasonable, as gathered from the whole instrument which disposes of perishable property; and, as Lord Eldon laid down the rule, where personal property is not specifically given, and consists of an interest wearing out, or one salable at present, yet in point of enjoyment future, the whole should be converted into money as between tenant for life and remainder-man.<sup>1</sup> Wherever, then, a will contains no expression of intention that the perishable property bequeathed shall be enjoyed *in specie*; where, for instance, household furniture, liquors, garments, plate, and the like, are given for life, along with money in the funds, and other securities; the court is justified in treating the perishable property at its cash valuation, and in directing it to be turned into money and invested, the income only to be paid regularly to the party or parties for life in succession, while the principal is reserved for the remainder-man.<sup>2</sup>

This exception in regard to things *quæ ipso usu consumuntur* may therefore at the present day be considered as founded, not so much upon the testator's incapacity to limit over the beneficial enjoyment of such property, as upon his implied intention that the party first in interest

22 N. Y. 558; *Shaw v. Huzzey*, 41 Me. 495. cited; *Homer v. Shelton*, 2 Met. 194; *Minot v. Thompson*, 106 Mass. 587;

<sup>1</sup> See *Fearn v. Young*, 9 Ves. 552; *Clark v. Clark*, 8 Paige, 152; *Eichelberger v. Barnitz*, 17 S. & R. 293; *Howe v. Earl of Dartmouth*, 7 Ves. 137. L. R. 13 Eq. 267; *Hemenway v. Hemenway*, 134 Mass. 487.

<sup>2</sup> *Perry Trusts*, § 547, and cases

should be permitted to consume them.<sup>1</sup> The doctrine of things perishable in the use does not apply to a gift of farming stock.<sup>2</sup> And it has been held that where a man's wearing apparel is given with other things to the wife for life, with remainder over, she has not the absolute interest in them; though it was argued in this case that she might have consumed the garments by putting them upon her children or servants.<sup>3</sup>

The rule of the civil law with regard to perishable property was somewhat different. Under that system of jurisprudence, the usufruct of things consumed carried along with it the property; and it was all the same whether one had the use or the usufruct of such things as grain and liquors given him. Yet the usufructuary was distinguished from the proprietor, in being compelled, after the usufruct had expired, to restore, according as his title obliged him, either an equal quantity of the same kind with that which he had received, or the value of the things at the time he received them.<sup>4</sup>

§ 141. *Use by the Party in Immediate Interest.* — Where articles are limited over *in specie*, by way of remainder, the party holding the particular estate or interest must not waste the goods any more than a life tenant of lands, since the enjoyment of property, whether real or personal, is, in either case, by way of usufruct only. Specific chattels, it may be said, are to be enjoyed and used, each according to its nature, and beneficially. Allowance for ordinary wear and damage should be made in favor of the party who has the particular interest; and the articles *in specie* shall be given up at the end of his term in the condition in which they may then happen to be, although wasted and diminished by the use, provided they have not been misused. Where such property

<sup>1</sup> *Morgan v. Morgan*, 14 Beav. 72; 7 E. L. & Eq. 216; 2 Kent Com. 353; *Patterson v. Devlin*, McMull. 459; *Randall v. Russell*, 3 Meriv. 194; *Smith v. Barham*, 2 Dev. Eq. 420; *Jones v. Simmons*, 7 Ire. Eq. 178. <sup>2</sup> *Groves v. Wright*, 2 Kay & J. 350. And as to shipping see *Healey v. Tappan*, 45 N. H. 243. <sup>3</sup> *In re Hall's Will*, 1 Jur. n. s. 974. See *Cockayne v. Harrison*, L. R. 13 Eq. 432; *Helme v. Strater*, N. J. Ch. (1896), important.

<sup>4</sup> 1 Dom. Civ. Law, §§ 989, 990.

is sold, however, and the proceeds are invested in interest-bearing securities of an incorporeal character, the element of consumption by use becomes practically eliminated from the computation; and to sell consumable articles and so invest the proceeds is the usual practice whenever a will permits of the construction, rather than to give them over *in specie* to the life-tenant.<sup>1</sup> Where "net proceeds" of a fund after paying charges and expenses are to go to the life beneficiary, all ordinary wear and tear should be borne by the income; but probably for large and unusual expenses a different rule would apply.<sup>2</sup>

§ 142. **Rule applied to Animals.** — If domestic animals are bequeathed for life with remainder over, the tenant for life, taking the increase to himself, is bound to keep up the number of the original stock. But if the usufruct happens to be of such animals as cannot produce young ones, as a set of horses or mules, or of any one beast alone, the person having the life-interest will not be bound to fill up the place of one which dies through no fault on his part.<sup>3</sup> The life beneficiary of animals takes presumably all increase of live stock to himself.<sup>4</sup>

§ 143. **Rule applied to Stock and Bonds; Dividends, Interest Coupons, etc.** — Where personal property invested in stocks is limited over by way of remainder, the income being payable to an intermediate party having the particular estate,<sup>5</sup> the question sometimes arises as to the disposition of extraordinary profits which have been declared on the stocks by way of dividend. The rule of the English chancery courts appears to be to consider such bonuses, or extra dividends, whether consisting of additional shares, or payable in cash, as an accretion of capital; and investment is decreed accord-

<sup>1</sup> See 2 Kent Com. 354; Perry Trusts, § 552. Personal chattels may be used by the tenant in life, if he is entitled to possession, in any place; or he may let them out to hire. *Marshall v. Blew*, 2 Atk. 217. But he cannot pawn or sell them beyond

the extent of his own interest. *Hoare v. Parker*, 2 T. R. 376.

<sup>2</sup> See Jones, *Re*, 103 N. Y. 621.

<sup>3</sup> 2 Kent Com. 353, n.; 1 Dom. Civ. Law, §§ 986-988; *Horry v. Glover*, 2 Hill Ch. 521.

<sup>4</sup> See Perry Trusts, § 546.

<sup>5</sup> Perry Trusts, § 543.

ingly; the effect of which rule may be that the tenant or beneficiary for life takes less and the remainder-man more, than his fair proportion.<sup>1</sup> And such extraordinary accumulations have been set apart for the remainder-man, even where they manifestly arose from profits made during the term of the beneficiary for life.<sup>2</sup> But where it appears affirmatively that the extra dividend arises from increased profits of the current year, it is held to belong to the beneficiary for life.<sup>3</sup>

The English rule in this respect seems to have originated in reasons of convenience rather than of fairness; Lord Loughborough, in the first instance of the kind, objecting to hunting back and seeing to what part of the saving each was entitled;<sup>4</sup> and Lord Eldon afterwards acceding with reluctance to a practice which could not well be supported, as he thought, on principle.<sup>5</sup> And to judge from the latest English decisions on this point, the line in favor of the remainder-man appears to be drawn at bonus dividends which are appropriated by a company as an actual increase of the capital stock.<sup>6</sup> But in this country the attempt is sometimes made to apportion surplus accumulated and stock dividends in such cases. Thus, the rule in Pennsylvania is distinctly declared to be, that, on the one hand, a surplus fund accumulated in stock over and above the current dividends at the time of the testator's death is part of the stock itself and goes as principal; and that, on the other hand, all accumulations after the testator's death are as much a part of the income as the current dividends, and as such belong to the legatee of the income or profits for life, who has the right to take

<sup>1</sup> *Brander v. Brander*, 4 Ves. 800; *Paris v. Paris*, 10 Ves. 185; *Gilley v. Burley*, 22 Beav. 624; *Wms. Pers. Prop.* 5th Eng. ed. 240.

<sup>2</sup> *Brander v. Brander*, 4 Ves. 800.

<sup>3</sup> *Barclay v. Wainwright*, 14 Ves. 66; *Preston v. Melville*, 16 Sim. 163.

<sup>4</sup> See *Brander v. Brander*, 4 Ves. 800.

<sup>5</sup> See *Paris v. Paris*, 10 Ves. 185.

A later case before Vice-Chancel-

lor Wood supports the same doctrine; and new shares issued by a steam navigation company to represent surplus profits for the preceding half-year, which had been laid out in the purchase of new steamers, were held to be capital and not income, as between a beneficiary for life and remainder-men. *Barton's Trusts*, L. R. 5 Eq. 238.

<sup>6</sup> See *Bouch v. Sproule*, 12 App. 385. Cf. [1894] 3 Ch. 578.

them, notwithstanding that the accumulations were withheld from distribution for a time after the testator's death.<sup>1</sup> This is manifestly the just rule, though by no means easy of practical application. In other States again, as, for instance, Massachusetts, the English chancery rule is favored, from motives of convenience; and the tendency of these courts appears to be to treat stock dividends as *prima facie* capital, and cash dividends as *prima facie* income.<sup>2</sup> But in the latest Massachusetts cases this rule seems to be so far modified as to regard any dividend made of the stock of the corporation which has been bought in by the corporation from its earnings as income and payable to the tenant for life if the dividend represents no actual increase of the capital stock.<sup>3</sup>

§ 143a. *The Same Subject.*—Questions of this sort should be determined, however, according to the peculiar circumstances of the case presented, and such is the preferable modern tendency. There are circumstances under which the avails of stock bonuses, extra dividends, or dividends, would be treated as income and not capital, when the rights of life-tenant and remainder-man are under consideration.<sup>4</sup> And money dividends, under certain corresponding circumstances, are treated as capital and not income; as, for instance, where banks are wound up and their assets distributed by way of dividend among the stockholders.<sup>5</sup> Profits received by trustees, under the sale at an advance of a subscription right to new stock, are, by the Pennsylvania rule, regarded as income and not capital.<sup>6</sup> A

<sup>1</sup> Earp's Appeal, 28 Penn. St. 368. And see Van Doren v. Olden, 4 C. E. Green (N. J.), 176; Lord v. Brooks, 52 N. H. 77; 64 Penn. St. 256; Vinton's Appeal, 99 Penn. St. 434.

<sup>2</sup> Minot v. Paine, 99 Mass. 101; Daland v. Williams, 101 Mass. 571. Where corporation property consisted wholly of real estate, and part of it was taken by eminent domain, the compensation money, if distributed, belongs to the capital and not the income of a trust fund invested in the shares. Heard v. Eldredge, 109 Mass. 258. See also 136 U. S. 549.

<sup>3</sup> Leland v. Hayden, 102 Mass. 542; Perry Trusts, § 545, notes.

<sup>4</sup> E.g. Leland v. Hayden, 102 Mass. 542. As to adjustment of U. S. legacy tax, in such cases, see Sohler v. Eldredge, 103 Mass. 345.

<sup>5</sup> Perry Trusts, §§ 544, 545, and cases cited.

<sup>6</sup> Wiltbank's Appeal, 64 Penn. St. 256. But as to purchasing new shares under an option, where capital stock is increased, see Moss's Appeal, 83 Penn. St. 264. And see 99 Penn. St. 434.

dividend declared on shares before the testator's death, but not actually payable until after his death, has been regarded, under the English rule, as capital and not income.<sup>1</sup> The intention of a testator is always an element for consideration, and, in compliance with his wishes, where wasting securities are specifically bequeathed by him, the life-tenant has been allowed to receive the dividends, even though, as in the case of a company whose dividends are derived from the sale of lands, every dividend must necessarily lessen the capital stock.<sup>2</sup>

Cases somewhat analogous to those of stock bonuses may arise in bond investments. In England the life beneficiary is so far favored above the party in remainder as to the entire actual income, that no part of the income is to be used for indemnifying the latter against the disadvantage of having stock purchased above par by the trustee which will eventually come to the remainder-man at only par. Perhaps in the difficulty of estimating such speculative and prospective values lies the good sense of such a rule; for by the rise of stock thus purchased, the value of the capital may be greatly enhanced at the life beneficiary's death.<sup>3</sup> In Massachusetts, however, the majority of the court has once attempted to apply to the trustee's purchase of bonds at a premium a rule more advantageous to the party in remainder.<sup>4</sup>

<sup>1</sup> *De Gendre v. Kent*, L. R. 4 Eq. 283.

<sup>2</sup> See *Read v. Head*, 6 Allen, 174; *Hill Trustees*, 3d Am. ed. 566. And see *Wilday v. Sandys*, L. R. 7 Eq. 455; 146 N. Y. 78.

The subject of stock dividends, bonuses, extra dividends, &c., is considered at more length in *Perry Trusts*, §§ 544, 545. According to the better modern opinion, the old rule in favor of the remainder-man is so far changed that dividends in money which come from the earnings of the capital invested belong to the tenant in life. *Perry Trusts*, § 545; *Barclay v. Wainwright*, 14 Ves. 66; 1 McClel. 527; *Johnson v. Johnson*,

15 Jur. 714; *Plumbe v. Neild*, 6 Jur. n. s. 529; *Lord v. Brooks*, 52 N. H. 77; *Read v. Head*, 6 Allen, 174. Cash dividends, extra dividends, or bonuses declared from the earnings, are thus held to be income and to belong to the tenant for life. *Perry*, § 544. And of course a dividend earned before the testator's death, but declared afterwards, goes to the tenant for life. *Bates v. Mackinley*, 31 Beav. 280.

<sup>3</sup> *Perry Trusts*, § 547.

<sup>4</sup> See *New England Trust Co. v. Eaton*, 140 Mass. 582, three judges dissenting (including Morton, C. J.). Here the trustee was directed by the court to retain from the life benefi-



§ 144. **Income and Capital; Life-Tenant and Remainder-Man.** — Every beneficiary for life of the residue of personal estate, under a will, is entitled to the income of all such part of the residue as has not been required for the payment of debts and administration, and is found to be in a proper state of investment; and to the income of such property he is entitled from the death of the testator.<sup>1</sup> Where legacies are bequeathed and the residue given to a tenant for life with remainder over, the court, in adjusting the accounts between tenant for life and remainder-man, will consider the debts and legacies as paid, not out of capital only, nor out of income only, but with such portion of the capital as, together with a proportional part of the income of that portion, would appear sufficient for the purpose.<sup>2</sup> And if legacies are given to legatees contingent upon their reaching a certain age, the life-beneficiary is entitled to the intermediate income of the fund set apart to meet the contingency.<sup>3</sup>

§ 145. **Rule of Apportionment applied.** — There is a general rule of law which forbids the apportionment of periodical payments which become due at fixed intervals; and, under its strict operation, the remainder-man might stand upon a more advantageous footing than is reasonable with respect to the beneficiary for life. But this rule, like that of surplus dividends, is founded in judicial convenience rather than justice; and modern policy discourages its application in many cases where the life-tenant would be injuriously affected thereby. When a debt is secured by bond or mortgage, the

ciary's income enough to make good to the capital the amount of premiums paid in purchasing such "permanent" securities. This appears to be not only an unfair rule, but one which makes vain effort to take in the full scope of consequences. Financial experience has since shown that many such railway and other investment bonds, apparently quite safe, have defaulted on interest coupons and gone through a process of insolvent reorganization, to the utter discomfit-

ure of such attempts to adjust prospective income to capital.

<sup>1</sup> *Angerstein v. Martin*, T. & R. 282; *Allhusen v. Whittell*, L. R. 4 Eq. 295. See *Parnham's Trusts*, L. R. 18 Eq. 413. For the rule as to giving the tenant for life the first year's income, in connection with the settlement of an estate, see *Perry Trusts*, § 551, and cases cited; *Angerstein v. Martin*, 2 Sim. 18; *Williamson v. Williamson*, 6 Paige, 303.

<sup>2</sup> *Allhusen v. Whittell*, L. R. 4 Eq. 295.

<sup>3</sup> *Ib.*

interest may be apportioned, because it is regarded as earned from day to day, even though the interest be expressly made payable half yearly.<sup>1</sup> Large accumulations of profits extending over a number of years have been held in this country to be apportionable.<sup>2</sup> Where the life-tenant of real estate dies, his rent is almost universally apportionable, under both English and American statutes.<sup>3</sup> As to annuities, equity will sometimes presume, from the necessities of the case, that apportionment was intended, and make its decree accordingly.<sup>4</sup> And recent statutes are to be found, which extend this same reasonable doctrine of apportionment to persons entitled to the income for life of any property, whether real or personal, as against remainder-men.<sup>5</sup> Yet we must remember that, at the common law, neither rents nor annuities could be apportioned. And, independently of local legislation, there is no apportionment of dividends; so that if stock be settled in trust for one person during life, with remainder to another, the remainder-man is entitled to the whole of the dividend which falls due next after the decease of the person entitled for life.<sup>6</sup>

The remainder-man is entitled to the fund upon the death of the owner of the life estate; income or interest as from such date is due him, and no deduction should be made from the fund for administering on the life-beneficiary's estate.<sup>7</sup>

§ 146. **Rule against Perpetuities.**—The rule against perpetuities is applicable to limitations of personal as well as of real property. In order to prevent the fancies and conceits of dying men from embarrassing their successors, the

<sup>1</sup> *Edwards v. Countess of Warwick*, 2 P. Wms. 176; *Sherrard v. Sherrard*, 3 Atk. 502.

<sup>2</sup> *Earp's Appeal*, 28 Penn. St. 368.

<sup>3</sup> 3 Kent Com. 471 and *n.*; Stat. 11 Geo. II. c. 19, § 15; *Perry Trusts*, § 556.

<sup>4</sup> *Hay v. Palmer*, 2 P. Wms. 501; *Howell v. Hanforth*, 2 Bl. 843; 3 Kent Com. 471.

<sup>5</sup> See Stat. 4 & 5 Will. IV. c. 22, § 2; Wms. Pers. Prop. 5th Eng. ed.

240. Why such legislation is not common in the United States is doubtless because there is less occasion to apply for it; the policy is manifestly just. See Mass. Pub. Stats. c. 136, § 25; *Sohier v. Eldredge*, 103 Mass. 345.

<sup>6</sup> *Pearly v. Smith*, 3 Atk. 260; *Sherrard v. Sherrard*, 3 Atk. 502; 65 N. H. 8. See *Paton v. Sheppard*, 10 Sim. 186; *Granger v. Bassett*, 98 Mass. 462; *Perry Trusts*, § 556.

<sup>7</sup> *Reiff's Appeal*, 124 Penn. St. 145.

courts long ago decided that the vesting of a devise should not be postponed beyond a certain reasonable period; and the same holds good of a bequest. That period, as finally fixed upon, is the period of a life or lives in being at the death of the testator, and the term of twenty-one years more; to which is added the period of gestation in case of a devisee *en ventre sa mère*.<sup>1</sup> Hence, an executory devise or bequest, limited to take effect after the indefinite failure of issue of a person living or deceased, creates a perpetuity, and is void for remoteness.<sup>2</sup> And where one sets apart by his will a certain sum of money, directing that the interest be applied in keeping up repairs on a family tomb, this is likewise void.<sup>3</sup> But charitable trusts are an exception to the rule against perpetuities; for it is of the essence of charity to be never failing.<sup>4</sup> Hence, some difficulty might be experienced in a case where a bequest of personal property verged very closely upon the nature of a charitable trust,—as if one made a gift of income for repairing the tombs of his distant kindred. Sometimes, too, a bequest which is too remote of itself is accompanied by a charitable bequest; and here the English decisions appear to have established the proposition that where a sum of money is given, part of which is to be applied to a purpose too remote, and the rest for charitable purposes, the whole gift must fail.<sup>5</sup> But still there is considerable conflict in the English cases as to how far a gift to persons within the allowed limits fails in general by being mixed up with others which come within the prohibition against perpetuities.<sup>6</sup> And the New York rule

<sup>1</sup> 1 Jarm. Wills, 226, 227; 2 Redf. Wills, 1st ed. 845, 846; Cadell v. Palmer, 1 Cl. & Fin. 372.

<sup>2</sup> *Ib.*; Wms. Pers. Prop. 5th Eng. ed. 245; Bengough v. Edridge, 7 Sim. 173; 7 Bligh, 202. Of two possible constructions of a will, that seems to be preferred which would avoid violating the rule against perpetuities. Rand v. Butler, 48 Conn. 293.

<sup>3</sup> Rickard v. Robson, 31 Beav. 244. See Hunter v. Bullock, L. R. 14 Eq. 45.

<sup>4</sup> See 2 Redf. Wills, 821; Williams

v. Williams, 4 Sel. 525; White v. White, 7 Ves. 423; Odell v. Odell, 10 Allen, 1; Schoul. Ex'rs, § 464.

<sup>5</sup> Fowler v. Fowler, 10 Jur. n. s. 648; Chapman v. Brown, 6 Ves. 404; Cramp v. Playfoot, 4 Kay & J. 479.

<sup>6</sup> Arnold v. Congreve, 1 Russ. & My. 209; Lord Dungannon v. Smith, 12 Cl. & Fin. 546; Webster v. Boddington, 26 Beav. 128; Wilson v. Wilson, 4 Jur. n. s. 1076, and other cases cited in 2 Redf. Wills, 849; 23 Hun, 223; Schoul. Ex'rs, § 465.

is a reasonable one, that if some gifts are valid *per se*, and others void, the court will sustain the former if they can be separated from the latter.<sup>1</sup>

As a testator cannot postpone the vesting of an executory devise or bequest for a longer term than twenty-one years, besides the lives in being already mentioned, so he cannot extend that term even where he does not avail himself of the privilege of lives in being. Where, for instance, the testator directed a postponement of the vesting for twenty-eight years after his death, the limitation was held void; and there being other limitations dependent upon this, they fell through in consequence.<sup>2</sup> But this rule does not prevent one from postponing the vesting for thirty, or any number of years, provided the property be ultimately to vest in persons who are living both at the time of the testator's death and at the time of the vesting, since that renders it impossible for the term to extend beyond the period of an existing life.<sup>3</sup> The question of remoteness, it must, however, be borne in mind, is to be determined by reference to possible events, and not to those which actually occur; and a limitation to such persons or upon such events that it may lead to a perpetuity under the rule is void, whatever might be found to be the facts if one waited long enough to ascertain them.<sup>4</sup> And, of course, the reckoning of all such limitations is from the date of the testator's death, and not from the date of his will.<sup>5</sup>

The rule against perpetuities is most frequently violated by a devise or bequest to classes, individuals of which may not come into existence during the prescribed period; or to persons whose interest is deferred beyond the period of reaching the age of twenty-one years; the question being here, as always, not whether the estate actually vests within the time, but whether it may not.<sup>6</sup>

<sup>1</sup> Van Vechten v. Van Veghten, 8 Paige, 105.

<sup>2</sup> Palmer v. Holford, 4 Russ. 403; Speakman v. Speakman, 8 Hare, 180.

<sup>3</sup> Lochlan v. Reynolds, 9 Hare, 796; 1 Jarm. Wills (ed. 1861), 230; 2 Redf. Wills, 1st ed. 846.

<sup>4</sup> Church, &c. v. Grant, 3 Gray, 142, *passim*; Hodson v. Ball, 14 Sim. 558.

<sup>5</sup> 2 Redf. Wills, 850; 2 Jarm. Wills (ed. 1861), 257 and note; Tregonwell v. Sydenham, 3 Dow. 194, 215.

<sup>6</sup> 1 Jarm. Wills (ed. 1861), 233; 2

This whole doctrine of perpetuities is of more interest to English than American students. But it may be laid down that limitations of personal property, so far as the doctrine has been developed in our own courts, follow the English decisions in the main. The statutes of some States are explicit against permitting the suspension of ownership in property for long periods. Thus, in New York, the legislature has forbidden limitations or conditions, as to personal property, for a longer period than two lives in being at the date of the instrument creating it, or, if by will, in being at the death of the testator.<sup>1</sup>

§ 147. **Limits to Accumulations of Income; Thellusson Act.** — A kindred doctrine to perpetuities is that of the period during which income may be accumulated under an executory devise or bequest. The English statute which now controls this rule is that of 39 & 40 Geo. III. c. 98, familiarly known as the Thellusson Act. This statute restricts the term for accumulation to the life of the grantor or settlor of property and twenty-one years after his death, or during the minority of such person or persons as would otherwise be entitled under the will.<sup>2</sup> The object here is to prevent an avaricious and unfeeling ancestor from locking up his treasures altogether, principal and income alike, for the full period permitted in the rule against perpetuities which we have just considered. A Mr. Thellusson, whose memory is thus consigned by legislative enactment to an unenviable notoriety, had made an extraordinary will, by which he virtually disinherited his own offspring in favor of an unborn distant posterity, in directing the income of his property to be accumulated during the lives of all his children, grandchildren, and great-grandchildren, who were living at the time of his death, for the purpose of creating a princely fortune to be

Redf. Wills, 1st ed. 847; Boughton v. James, 1 Coll. 26; s. c. 1 H. L. Cas. 406. Schouler Ex'rs, § 465; and in general, John C. Gray on Perpetuities.

<sup>1</sup> 1 N. Y. Rev. Stats. 773, §§ 1-5; 2 Kent Com. 353, n. See Dodge v. Pond, 23 N. Y. 69; Odell v. Odell, 10 Allen, 1; Perry Trusts, §§ 377-390; Schouler Ex'rs, § 465; and in general, John C. Gray on Perpetuities. <sup>2</sup> See Wms. Real Prop. 6th ed. 286; 2 Redf. Wills, 1st ed. c. 16, *passim*; Thellusson v. Woodford, 4 Ves. 221; 11 ib. 112; Schouler Ex'rs, § 465; Perry Trusts, §§ 393-399.

spent by the later descendants of his family ; and although keeping within the strict letter of that rule which permits an executory devise or bequest to be so long suspended,—a rule which in strictness would include both capital and income,—he so moved his fellow-countrymen to indignation that it was determined to prevent by act of Parliament the possible repetition of any such exhibition of family pride at the expense of family affection. Similar legislation may be found in some of the United States, as in New York and Pennsylvania. But where no such statute is found, the usual rule against perpetuities furnishes the only limitation.<sup>1</sup>

Under the Thellusson Act, it is held that directions for accumulating income beyond the period allowed are good for that portion of time which comes within the act, and are only void as to the remainder.<sup>2</sup> But, independently of statutes, any trust for accumulation which transcends the rule against perpetuities would be void *in toto*, and the estate would vest in the same manner as if the entire direction with regard to accumulation had been omitted.<sup>3</sup> And this is the New York rule ; the income going as in case of intestacy.<sup>4</sup>

<sup>1</sup> In New York, the period for accumulation must be during the minority of the persons to be benefited, and terminate at the expiration of their minority ; and the statute of this State is, in many respects, like the Thellusson Act. All directions for accumulation contrary to or in excess of the rule as defined by the legislature are so far void ; and if a minor for whose benefit a valid accumulation of interest or profits is directed be destitute, the court may apply a suitable sum from the accumulated moneys for his relief, as to support and education. 1 N. Y. Rev. Stats. 773, §§ 1-5 ; 2 Kent Com. 353, n. See *Dodge v. Pond*, 23 N. Y. 69 ; *Kane v. Gott*, 24 Wend. 641 ; *Gott v. Cook*, 7 Paige, 534 ; Penn. Stats. April 18, 1863, *Purd. Dig.* 853.

<sup>2</sup> *Wms. Real Prop.* 4th Am. ed. 306 ; 2 Redf. Wills, 838, 839 ; 1 Jarm.

Wills, 286, 287 ; *Rosalyn's Trust*, 16 Sim. 391.

<sup>3</sup> *Boughton v. James*, 1 Coll. 26 ; s. c. 1 H. L. Cas. 406 ; *Scarisbrick v. Skelmersdale*, 17 Sim. 187.

<sup>4</sup> *Hull v. Hull*, 24 N. Y. 647. See *Phelps's Executor v. Pond*, 23 N. Y. 83, commenting upon *Kilpatrick v. Tolinson*, 16 N. Y. 322 ; 1 N. Y. Rev. Stats. 726, § 40 ; *ib.* 773, § 2 ; *Williams v. Williams*, 8 N. Y. 525 ; also *Odell v. Odell*, 10 Allen, 1. For cases arising under the Thellusson Act, as to disposition, and the principles they establish, see 2 Redf. Wills, 839, 840 ; 1 Jarm. Wills, 292. The Thellusson Act applies to the income of both personal and real estate. *Wms. Pers. Prop.* 245. But it does not extend to funds which were provided for the payment of debts, or for raising portions for children. See *Wms. Real Prop.* 4th Am. ed. 306 ; 2 Redf. Wills, 838, 839 ; 1 Jarm. Wills, 286, 287.

The rule against accumulations is not restrained to cases which expressly provide for accumulation, but it applies likewise to cases where provisions are made which by implication lead to this result; as, for instance, where the whole residue of an estate is given in such a manner that the vesting is substantially postponed until a later period than that allowed by law; for this must of necessity involve the accumulation of the residue by adding income to principal while the period of suspension lasts.<sup>1</sup> But a testator may do three things without violating any statute. First, he may suspend the absolute ownership of the corpus of his estate, and render it inalienable during the permissible period; secondly, he may during such suspension dispose of the income annually as it accrues, though not directing its accumulation except for a single purpose; thirdly, he may give vested legacies and provide for their payment at a future definite period. And upon these combined reasons a disposition was sustained in New York, some years ago, where a testator, after rendering his estate inalienable during the period allowed by law, gave pecuniary legacies, payable at future periods, with the manifest intention that they should be paid from income as it accrued, leaving the corpus of the estate to pass unimpaired to the residuary legatees.<sup>2</sup> Where bequests are given with directions for accumulation which are void under the statute, the English rule, which is recognized also in New York, is that only the direction for accumulation is to be held void, and that the bequest will take effect as though there had been no such direction.<sup>3</sup>

§ 148. **Real and Personal compared; As to Estates Tail.** — Notwithstanding the many strong points of resemblance which we have seen between real and personal interests in expectancy, there are some rules worthy of special mention which do not seem to apply with equal force to the two prop-

<sup>1</sup> 1 Jarm. Wills, 293; 2 Redf. N. Y. 69. See *Mandlebaum v. McWills*, 840 and notes; *Bryan v. Collins*, 16 Beav. 14.

<sup>2</sup> *Ib.*; *Williams v. Williams*, 4 Seld. 525; *Martin v. Margham*, 14 Sim. 230.

erty systems. Thus, an estate tail in lands is created by those technical and almost inflexible words "heirs of the body." But the same expression, when used with reference to chattels, gives the absolute interest to the first donee, unless something can be found in the instrument to show that the donor's intention was clearly to restrict him to a life estate ; in which case the heirs, if they were to take after the life estate has determined, will take as purchasers and not by way of limitation.<sup>1</sup> And even the more manageable expression "issue" is subject to the same rule of construction under these circumstances if sanctioned by the whole scope of the will ; namely, in favor of an absolute gift to the first donee.<sup>2</sup> Estates tail, whether in real or personal property, are very rarely met with in American practice, so that one must rely chiefly upon the shifting opinions of the English chancery for the later development of this doctrine. There the disposition was formerly to apply the old rules of tenure to aid in construing wills of personal property. But more recently the current of authority turned in favor of regarding more liberally the giver's actual intention in such cases, and confining feudal reasons to the feudal property in which they originated.<sup>3</sup>

Chancellor Kent says positively that the same words which under the English law would create an estate tail as to freeholds give the absolute interest as to chattels.<sup>4</sup> But this statement is too broad ; certainly so far as concerns England. And with regard to the United States as well as England, we think the rule is better stated by one of our later equity jurists in these words : "The natural presumption in regard

<sup>1</sup> 2 Kent Com. 354 ; 2 Redf. Wills, 385 ; Jackson v. Bull, 10 Johns. 19 ; *Ex parte* Wynch, 5 De G. M. & G. 188, and cases cited.

<sup>2</sup> See *Ex parte* Wynch, *ib.*, where this whole subject is fully discussed and authorities cited. And see Knight v. Ellis, 2 Br. C. C. 570 ; Chandless v. Price, 3 Ves. 99.

<sup>3</sup> *Ib.* See, further, Andrews's Will, 27 Beav. 608 ; Christie v. Gosling,

Law Rep. 1 H. L. 279 ; Henderson v. Cross, 7 Jur. n. s. 177 ; Wms. Pers. Prop. 5th Eng. ed. 242. Mr. Williams's dislike of expectant estates in chattels seems to have carried him very far beyond the chancery courts in his statements on this point.

<sup>4</sup> 2 Kent Com. 354, and cases cited. For an instance of executory trust in jewels, see Shelley v. Shelley, L. R. 6 Eq. 540.



to personal estate is, that the whole interest was intended to be given unless something else is clearly expressed. And in regard to real estate it is ordinarily intended that a life estate merely was intended to be conveyed, when no words of inheritance are used, unless an intention to give the fee is clearly expressed."<sup>1</sup> In this country the heir is more readily regarded as purchaser, however, than in England.<sup>2</sup>

It has generally been understood that where real and personal estate are included in one and the same bequest, and the real estate must be held to have vested, the same rule of construction will be applied to the personal estate.<sup>3</sup> Limitations of property real and personal, with remainder by way of estate tail, are to be found blended together sometimes in modern practice.<sup>4</sup> In the United States, real and personal property are made to follow the same general rules of distribution under the local codes, so that we are free from many of those perplexities of construction which are inseparable from the system of our mother country.

§ 149. *Real and Personal compared; As to Contingent Remainders.* — The feudal law with respect to contingent remainders was exceedingly abstruse. Where an estate in land was

<sup>1</sup> *Per* Redfield, C. J., in *White v. White*, 21 Vt. 250.

<sup>2</sup> *Whitehead v. Lassiter*, 4 Jones Eq. 79; *Chew's Appeal*, 37 Penn. St. 23; *Ingram v. Smith*, 1 Head, 411; 2 Redf. Wills, 388-391.

<sup>3</sup> *Farmer v. Francis*, 2 Sim. & Stu. 505; *Tapscott v. Newcombe*, 6 Jur. 755.

<sup>4</sup> Thus, in *Christie v. Gosling*, which was decided on appeal in the House of Lords in 1866, the question arose as to the construction of a will which devised lands for life with remainder to certain sons in tail, and also gave certain personal estate to be held by trustees upon such trusts and for such estates and interests as were declared concerning the real estate, or as near thereto as the rules

of law or equity would admit, with a proviso that the personal estate should not vest absolutely in any tenant in tail unless such person should attain twenty-one. The life-tenant being dead, the bequest of the personalty was declared valid up to and including his eldest son, then under age; and it is understood that this decision meant to go further, to the extent of ruling that, on the death of the eldest son under twenty-one, the bequest of personal property would go over to the next person named in the will as tenant for life or tenant in tail, as the case might be. *Christie v. Gosling*, L. R. 1 H. L. 279. See *Harrington v. Harrington*, L. R. 3 Ch. 564. And thus stands the English rule at this day.

invariably fixed, to remain to a certain person after the particular estate was spent, it was called a *vested* remainder, the estate being already vested, though still in expectancy ; but where the estate was to take effect either to an uncertain person or upon some uncertain event, the name of *contingent* remainder was applied, for it remained suspended, in mid-air, as it were, and might never vest at all.<sup>1</sup> Now, limitations of personal property, as we have seen, are more analogous to executory devises than to remainders, whatever the term applied ; if, indeed, the language of feudal tenure be applicable at all. The essential quality of an executory devise, that which gives it the great advantage over a contingent remainder, is that while the owner of the intervening estate might, and often did at the common law, defeat a contingent remainder altogether, by a certain mode of conveyance which would effect a sort of legal abortion, he can by no act of his own prevent expectant interests under an executory devise from coming into being or vesting at the appointed time.<sup>2</sup> Hence is the general principle that every interest in personal property, which is provided to take effect *in futuro* is of an indestructible nature, and, notwithstanding the acts of a party having the present beneficial enjoyment, takes effect in its proper turn ; so long, at least, as the rule against perpetuities is not violated.<sup>3</sup>

Where a remainder in lands had been devised to sons of the tenant for life, it was held in Massachusetts that on the usual principle of tenures the remainder vested on the death of the testator in the sons then living, but in case of after-born children opened again and let them in.<sup>4</sup> But Chief Justice Parsons adds : "Of a chattel there can be no remainder, which may vest and afterwards open to let in after-born children ; and the interest in it must be contingent,

<sup>1</sup> See 2 Bl. Com. 168, 169.

<sup>2</sup> Hopkins v. Hopkins, 1 Atk. 581 ; Wms. Real Prop. 4th Am. ed. 302 ; Nightingale v. Burrell, 15 Pick. 104 ; 1 Jarm. Wills, 828, 829 ; 2 Redf. Wills, 650. Stat. 8 & 9 Vict. c. 106,

§ 8, changes materially the law of contingent remainders in that country.

<sup>3</sup> 1 Jarm. Wills, 834 ; 2 Kent Com. 352, 353 ; Wms. Pers. Prop. 245.

<sup>4</sup> Dingley v. Dingley, 5 Mass. 535. And see Crisfield v. Storr, 36 Md. 129.

until the time provided for the distribution of it, in order that they may take."<sup>1</sup>

§ 150. *Real and Personal compared; As to Reversionary Interests.* — We do not find, as a matter of practice, that expectant estates are mentioned by way of strict *reversion*, in personal chattels. It would, of course, be inconsistent with testamentary dispositions to limit property in this manner. But the loan of chattels, with or without the stipulated payment of a certain sum for their use for a certain specified time, is a matter of every-day business. Pianos and other household furniture are often let with a house. We can hardly apply the term "expectant estates" to such chattel interests, although in many respects the owner's interest is somewhat analogous to the landlord's estate, by way of reversion, in lands which he has leased for a particular life or for years.<sup>2</sup> It is clear, however, that personal property may be subjected to much the same modifications of ownership as real estate, even though not by way of technical devise or bequest; and we may readily conceive of a case where some one making a family settlement — as a husband — might wish to so limit chattels to wife or child that there would be still an interest in himself, operating by way of reversion.

The term "reversionary interest" is, however, one of frequent application in the law of trusts to things both real and personal; and it appears to be applied without much discrimination to expectant interests in general; not in the more restricted sense of that residue which remains to one who has carved out of his own a lesser estate. We hear sometimes of "future or reversionary interests" in chattels, whether vested or contingent.<sup>3</sup> Most commonly are these expressions applied to family settlements.<sup>4</sup> Inasmuch as a reversion,

<sup>1</sup> *Dingley v. Dingley*, 6 Mass. 536. As to the old English practice of drawing settlements so as to preserve contingent remainders, see *Perry Trusts*, §§ 522, 523. 8 & 9 Vict. c. 106, renders these formalities no longer necessary. *Ib.*

<sup>2</sup> As to estates in reversion in lands, see 2 Bl. Com. 176.

<sup>3</sup> See *Burrill Dict.* "Reversionary Interest;" *Bouvier's Dict.* *ib.*; *Wms. Pers. Prop.* 350; *Ibbottson v. Rhodes*, 2 Vern. 554; *Browne v. Savage*, 7 W. R. 571.

<sup>4</sup> See *Schouler Dom. Rel.* 131; *Peachey Marr. Settl.* 165, 261, 733; *Osborn v. Morgan*, 8 E. L. & Eq. 192; *9 Hare*, 432.

unlike a remainder, arises by operation of law, there is no particular reason why the term "reversionary interest" should not have a more exact meaning in connection with things personal, if a corresponding convenient term were applied to interests by way of remainder.

§ 151. **Real and Personal compared; As to Conditional Devise or Bequest.**—The distinction between limitations of real and personal property may be further illustrated by the case of a conditional devise or bequest. Landed estates granted on condition precedent could not, at common law, vest in the grantee until the condition had been performed; while those granted on condition subsequent vested at once, but were liable to be defeated afterwards through non-performance.<sup>1</sup> Hence, where one makes a will containing a devise of lands upon condition to some person in expectancy, it is material to inquire whether the condition be precedent or subsequent.<sup>2</sup> But in regard to personal property our law follows the rule of the civilians, which made no distinction between conditions precedent and subsequent. And hence, where a legacy depends upon a condition precedent which becomes impossible, the bequest will vest and become absolute; though it is otherwise where performance of the condition forms the consideration of the gift.<sup>3</sup> But where a gift is made upon an immoral condition, it fails altogether; this, too, being the doctrine of the civil law.<sup>4</sup>

§ 152. **Equity aids Parties in Expectancy; Security from Life Beneficiary, etc.**—Courts of equity furnish their assistance to parties interested in expectancy, where the chattels are already subject to an intermediate interest. The English rule was formerly more stringent than at present; security being required from the beneficiary for life, in favor of the person entitled by way of remainder. But Lord Thurlow

<sup>1</sup> See 2 Bl. Com. 152-154; Co. Lit. 201.

<sup>2</sup> 2 Wms. Ex'rs, 1131, and n.; Gorst v. Lowndes, 11 Sim. 434; 2 Redf. Wills, 661 *et seq.*; Moakley v. Riggs, 19 Johns. 71, 72.

<sup>3</sup> 2 Jarm. Wills (ed. 1861), 13; Reynish v. Martin, 3 Atk. 330; Maddox v. Maddox, 11 Gratt. 804; 2 Greenl. Cruise, 16; 2 Redf. Wills, 665, 675.

<sup>4</sup> *Ib.*; Swinb. pt. 4, § 6, pl. 16. See, further, c. on Legacies, *post.*

says, in *Foley v. Burnell*, that these cases have been overruled, and chancery now demands of the intermediate party only an inventory, which affords more equal justice.<sup>1</sup> If there should appear, however, good cause to apprehend that the property would be wasted, secreted, or removed by the plaintiff, security may still be required.<sup>2</sup> The American cases generally support the same views.<sup>3</sup> But as executors and trust officers generally are in the habit of giving bonds for the performance of duties, it can hardly be considered unreasonable to require some kind of security, at least, in the remainder-man's favor, from the life beneficiary in possession, especially if the property itself is easily capable of destruction or removal; though where the property is in the hands of trustees having the legal estate, such special precautions might be unnecessary. Where property is given by the executor to the tenant for life and by him consumed, the executor either of the testator or of the tenant for life may be held responsible.<sup>4</sup> The rule in Pennsylvania under legislative enactment is to require security in all cases, under the direction of the Orphans' Court, where chattels are bequeathed to one for life and then limited over.<sup>5</sup>

The civil law made the usufructuary, in general, give not only an inventory, but the necessary security, which, according to circumstances, would be with or without sureties; and if the property might be easily injured, this constituted an important element in determining as to the need of sureties.<sup>6</sup>

§ 153. *Death of Life Beneficiary; Presumptions.* — In a case where the life beneficiary of a fund had been transported in 1832 and had not afterwards been heard of, the remaindermen applied twenty years later for payment, on the pre-

<sup>1</sup> *Foley v. Burnell*, 1 Br. C. C. 274. White, 1 C. E. Green, 411; Perry

<sup>2</sup> *Ib.*; 2 Kent Com. 354; 1 Jarm. Trusts, § 541, and cases cited.

Wills, 835.

<sup>4</sup> *Jones v. Simmons*, 7 Ire. Eq.

<sup>3</sup> *De Peyster v. Clendinning*, 8 172.

Paige, 295; *Homer v. Shelton*, 2 Met. 194; *Langworthy v. Chadwick*, 13 Conn. 42; *Henderson v. Vaulx*, 10 Yerg. 530; 2 Redf. Wills, 655, n.;

2 Kent Com. 354, and n.; *Rowe v.*

<sup>5</sup> See 2 Kent Com. 354, n. See also *Hawthorne v. Beckwith*, 89 Va. 786; *Bedford's Appeal*, 40 Penn. St. 18.

<sup>6</sup> 1 Dom. Civ. Law, 904.

sumption of death. Said the Master of the Rolls: "I will not now dispose of the capital, but I cannot refuse to order payment of the future dividends to the children, on their undertaking to abide by any order of the court to make good the dividends received by them out of their shares of the capital, if it should hereafter appear that their father is still alive."<sup>1</sup>

## CHAPTER VIII.

### JOINT AND COMMON OWNERS.

§ 154. **Number and Connection of Owners of Personal Property.** — The number and connection of owners is an important element to be considered in dealing with the law of personal property. Writers on the subject of real estate tell us that lands may be held either in severalty, or by joint tenancy, or by co-parcenary, or in common; and under these heads they embrace about all the law that pertains to the subject; though the title of husband and wife to land is something peculiar and might constitute still another topic.<sup>2</sup> Taking a corresponding standpoint from which to view the subject of personal property, we shall see that similar principles of classification are to be adopted. The very same terms are sometimes applied indiscriminately to lands and chattels, as where one speaks of a joint tenancy or a tenancy in common under a patent. But we are still to remember, as before, that while real estate is theoretically the subject of tenure, personal property is owned; and it would be more correct to designate persons as joint owners or owners in common, than as tenants of a chattel.

<sup>1</sup> *Per Romilly, M. R., In re Mileham's Trust*, 15 Beav. 507; 21 E. L. & Eq. 550.

Upon the general subject of personal property in expectancy, the student is referred to works upon Trusts. A good modern work upon this subject, especially for American readers,

is that of the late Jairus W. Perry. Lewin on Trusts has a good English reputation. The topics of this chapter are incidentally considered in the extensive works of Jarman and Redfield upon Wills.

<sup>2</sup> See 2 Bl. Com. 179-195; 1 Washb. Real Prop. c. 13.

§ 155. **Owners in Severalty; Joint and Common Owners.**—Where one holds or owns property, as the case may be, in his sole right, without any other person being joined or connected with him so long as his interest continues, we say that he is a tenant in severalty of the land, or a sole or several owner of the chattel. This species of ownership being the simplest and most familiar, needs no special exposition. Next, as to an estate by co-parcenary, that tenancy has sole reference to the inheritance of lands; and in this country, where the rule of equal descent and distribution prevails, as to both real and personal property, it has no application whatever.<sup>1</sup>

We have only then to consider, at length, in the present connection, two leading classes of owners to personal property: *first*, joint owners; *second*, owners in common. To these the present chapter will be exclusively devoted. As concerns the rights of husband and wife in one another's property, special treatises should be consulted by the reader;<sup>2</sup> and of partners, stockholders, and the like we shall speak hereafter.

§ 156. **Joint Ownership of Personal Property; Its Nature and Creation.**—*First*, as to joint owners of personal property. Where two or more are joined together with reference to the same property, having unities of title, time, interest, and possession, they are joint tenants thereof if the property be real, and joint owners if it be personal. Unity of title is necessary, that is to say, the title should arise under one and the same instrument, or be created by the same act on the part of the donor or seller; unity of time, that is, each interest should vest at the same moment; unity of interest, that is, these interests in the property should be for the same duration and the same quantity; and unity of possession, that is, each tenant or owner must have an undivided possession of each entire part as of the whole, and not possess, one a distinct and separate portion, and the other another distinct and separate portion.<sup>3</sup> The creation of such ownership de-

<sup>1</sup> 2 Bl. Com. 187, 399; 4 Kent Com. 363.

<sup>2</sup> See Schoul. Domestic Relations.

<sup>3</sup> 1 Bl. Com. 180-182, 399, and n.;

pend upon the acts of parties, for it does not result from operation of the law.

As there can be no "estate" in personal property, many of those technical distinctions which are made in the books between joint estates for life, in tail, or in fee, have no application to our present subject.<sup>1</sup> But any interest which may be lawfully created in chattels, whether immediate or expectant, is itself susceptible of joint as well as sole ownership; and, as we take occasion to show the reader elsewhere, personal property may be limited in modern times to very much the same effect as lands, notwithstanding the natural and technical differences between them.<sup>2</sup>

Household furniture, merchandise, animals, and other movables of a corporeal character, may therefore be so vested in two or more persons as to constitute them joint owners thereof.<sup>3</sup> There may likewise be joint owners of a promissory note;<sup>4</sup> of a patent-right;<sup>5</sup> of a legacy;<sup>6</sup> of stock;<sup>7</sup> of an insurance policy;<sup>8</sup> of a bank deposit;<sup>9</sup> and, in short, of any chattel, whether of a corporeal or incorporeal nature, whether in the nature of a *chose in possession* or of a *chose in action*; so long indeed as that chattel can be the subject of ownership at all, unless special reason to the contrary exists. Nor does the principle apply only to chattels personal; for chattels real, such as a lease for years, may be owned by two or more jointly.<sup>10</sup>

It is the fundamental principle of a joint tenancy, that while the parties constitute but one person, so to speak, as far as the rest of the world is concerned, with regard to

<sup>4</sup> Kent Com. 359; 2 Ib. 350; Co. Lit. 182 a.

<sup>1</sup> Wms. Pers. Prop. 5th Eng. ed. 276.

<sup>2</sup> See preceding chapter.

<sup>3</sup> 2 Bl. Com. 399; 2 Kent Com. 350; Crocker v. Carson, 33 Me. 436; Swartwout v. Evans, 37 Ill. 442.

<sup>4</sup> Conover v. Earl, 26 Iowa, 167; People's Bank v. Keech, 26 Md. 521.

<sup>5</sup> Pitts v. Hall, 3 Blatchf. 201; Curtis Patents, § 190.

<sup>6</sup> 2 Redf. Wills, 497; 2 Atk. 220; Armstrong v. Armstrong, L. R. 7 Eq. 518.

<sup>7</sup> Crossfield v. Such, 22 E. L. & Eq. 555.

<sup>8</sup> Farr v. Grand Lodge, 83 Wis. 446; [1892] 1 Ch. 90.

<sup>9</sup> 50 Hun, 477.

<sup>10</sup> Taylor Landl. and Ten. § 114; Burns v. Bryan, 12 App. 184. See also Given v. Kelly, 85 Penn. St. 309.



themselves each is entitled to an equal share of the rents, income, and profits, so long as he lives; and when one dies, the survivor takes the entire interest, to the complete exclusion of the heirs or personal representatives of the party deceased. This right of survivorship is the great clog upon property vested in joint owners as distinguished from those who own in common; for it seems very unreasonable on the face of it, that while both are equally owners, the longest liver should have the whole. And the modern policy of the law, strengthened and enforced by numerous local statutes, is to regard property which has been given or sold, granted or devised, to two or more persons without words indicating how it shall be held, as a tenancy or ownership in common rather than a joint tenancy or ownership.<sup>1</sup> And an exception which has long been made in favor of trade or agriculture is to regard the implements and stock used in any joint undertaking of this sort as exempted from the rule of survivorship; though here the modern principles to be applied are those peculiar to the law of partnership, which we shall examine hereafter.<sup>2</sup>

But it must be conceded that the policy of discouraging survivorship has been applied in practice more directly to lands than chattels; and this we have no doubt is mainly for the reason that a strict joint ownership (not a partnership) in chattels is seldom created so as to occasion hardship or last any considerable length of time, except it be by will. The construction of wills involves chiefly the question of testamentary intent; and bequests and legacies, dependent upon the contingency of one or another's death, are by no means unusual in various other connections. The doctrine of survivorship might apply well enough, then, to gifts of this sort, if so the testator intended it, though intolerable when enforced where two persons had bought and paid for goods and chattels together, and thus jointly acquired a title by

<sup>1</sup> See 2 Bl. Com. 183; 4 Kent Com. 359, 360, *n.*; 1 Washb. Real Prop. 408, and *n.*; 48 Ill. App. 145; 51 Kan. 153. Under a statute which abolishes survivorship as incident to joint tenancy, a deed or will may

expressly create such incident. *Jones v. Cable*, 114 Penn. St. 586.

<sup>2</sup> See Co. Lit. 182 *a*; 2 Kent Com. 359. And see next chapter as to Partners.

purchase. Subject to the exceptions made in favor of trade and agriculture, the rule has, it is true, been laid down, that if personal property, whether of a corporeal or incorporeal character, be given to A. and B. simply, without the use of other words, they will be joint owners, having equal rights as between themselves during the joint ownership, and being with respect to third persons but a single individual in the legal sense.<sup>1</sup> Whether, however, this would amount to a presumption in favor of survivorship, as against a *quasi* partnership in the property, the decided cases leave it rather difficult to determine; and the more so from the circumstance that the term "joint ownership" is frequently used in an indefinite sense, so far as personal property is concerned, — as it certainly ought not to be, — consequently embracing both the technical joint ownership and the ownership in common.<sup>2</sup> The modern rule of equity is certainly to defeat a joint tenancy wherever it is possible; and in this country the incident of survivorship is destroyed by statute almost entirely, except in the case of legacies or devises, and where persons are appointed co-executors or co-trustees or co-guardians,<sup>3</sup> or when one expressly creates the incident.

§ 157. *Joint Ownership under a Will* — As to legacies of personal property. Chancellor Kent says that the courts at one time leaned against any construction tending to support a "joint tenancy" in legacies of chattels, and testators were presumed to have intended to confer legacies in the most advantageous manner; but that in *Campbell v. Campbell* the Master of the Rolls reviewed the cases, and concluded that where a legacy was given to two or more persons, they would take jointly unless the will contained words to show that the testator intended a severance of the interest and to take away

<sup>1</sup> 2 Kent Com. 360; Wms. Pers. Prop. 5th Eng. ed. 276. And see *Crossfield v. Such*, 22 E. L. & Eq. 555.

<sup>2</sup> See *Swartwout v. Evans*, 37 Ill. 442; Pars. Partn. 548; *White v. Brooks*, 43 N. H. 402.

<sup>3</sup> See *Perry Trusts*, § 136; *Nicholson v. Caress*, 45 Ind. 479. *Kendall*

*v. Hamilton*, 4 App. Cas. 504, discusses the question of joint and separate liability on one contract. There is no settled rule of equity that a contract which in terms is joint and would be so construed at law is to be treated in equity as joint and several. *Ib.*

the right of survivorship ; and that this rule of construction has been declared and followed in the subsequent cases.<sup>1</sup> But yet legacies and general testamentary dispositions mainly depend upon the testator's intention, as we have already remarked. The legal construction of wills favors the vesting of legacies ; and the rule is general, that where a bequest to two or more whose names are coupled together fails as to one because of his death before the will can take effect, or from other cause, there is no lapse of the bequest so long as the other party or parties remained at the testator's death to take it by way of survivorship.<sup>2</sup> The effect of such a rule is to prevent a collapse of the testamentary gift, so that from this point of view it is certainly beneficial. And it should be added that words of survivorship are usually to be referred to the period of the testator's death. But if there be a previous life estate, it appears, according to the later English authorities, that the period of division among survivors will be the death of the person who has the life interest.<sup>3</sup>

§ 158. **Joint Executors, Trustees, etc.** — Executors, trustees, and other officers who have the legal estate in personal property are usually brought within the rule of joint ownership where two or more are appointed to act together; for it is inconvenient for such persons to hold as owners or tenants in common. The practice with regard to trust settlements is to make the trustees joint owners, in order that surviving trustees may take the entire fund, rather than that the executors or administrators of any trustee who may happen to die should have any right to meddle with the share of the deceased.<sup>4</sup> And so, too, where a bequest under a will is made to joint executors as a class, and one or more of them dies in the testator's lifetime, or after the testator's death and prior to the period of division or any severance of the joint own-

<sup>1</sup> 2 Kent Com. 351; *Campbell v. Campbell*, 4 Bro. 15; *Jackson v. Jackson*, 9 Ves. 591. See *Mayn v. Mayn*, L. R. 5 Eq. 150; *Morgan v. Britten*, L. R. 13 Eq. 28.

<sup>2</sup> *Humphrey v. Tayleur*, Ambler 136; *Morley v. Bird*, 3 Ves. 628;

*Cowdin v. Perry*, 11 Pick. 503; *Wms. Pers. Prop.* 8d Am. ed. 258, and n.

<sup>3</sup> 2 Redf. Wills, 2d ed. 489; *Wordsworth v. Wood*, 4 My. & Cr. 641; *Barber v. Barber*, 3 My. & Cr. 688.

<sup>4</sup> *Wms. Pers. Prop.* 5th Eng. ed.

ership, the whole property vests in the survivors for the purposes designated in the will.<sup>1</sup> In short, trust property, testamentary or otherwise, is generally limited to fiduciary officers as joint tenants, and such is the construction favored constantly by the court.<sup>2</sup>

While the presumption is in favor of joint ownership as regards co-executors, persons who are made owners in common as legatees are not permitted to defeat the purpose of the testator regarding the legacy, on the plea that they were also made joint owners as executors.<sup>3</sup>

§ 159. *Joint Ownership; How construed, etc.*—The doctrine of survivorship should have a beneficial, not a merely technical operation. Thus, wherever an estate is limited to two jointly, the one capable of taking and the other not, he who is capable shall take the whole.<sup>4</sup>

If two persons advance money by way of mortgage or otherwise, and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased of the share which the latter advanced.<sup>5</sup> And in many other ways does equity discourage the presumption of an unjust joint ownership of chattels, especially where some joint undertaking, trade, or speculation, is construed to be a *quasi* partnership. But wherever a joint ownership exists in a chattel, the rule of survivorship permits that joint owner who outlives his fellow owner to take the whole unaffected by any disposition which the latter may have made by his will.<sup>6</sup> But where there is a burden attached to the relation, as in a lease to joint parties with a covenant to pay rent, the representatives of the deceased tenant have been held jointly and severally liable with the survivor, though having no interest left as tenants.<sup>7</sup>

277; *Knight v. Gould*, 2 My. & K. 296; *Perry Trusts*, § 343; 2 Redf. Wills, 2d ed. 489.

<sup>1</sup> *Ib.*

<sup>2</sup> See *Perry Trusts*, § 343.

<sup>3</sup> See *Barber v. Barber*, 3 My. & Cr. 688; 1 Atk. 494; *Bain v. Lescher*, 11 Sim. 397.

<sup>4</sup> See *Humphrey v. Tayleur*, Ambl. 136.

<sup>5</sup> *Petty v. Styward*, 1 Ch. 57; *Lake v. Gibson*, 1 Eq. Ca. Abr. 290; *Perry Trusts*, § 136.

<sup>6</sup> See *Wms. Pers. Prop.* 5th Eng. ed. 276, 277.

<sup>7</sup> *Burns v. Bryan*, 12 App. Cas. 184.

An exception to the requirement of unity as to time occurs in case of a joint ownership created by will; to which there is a corresponding exception found where real estate is devised. Thus, under a bequest to A. for life, and after his decease to the issue or children of B., without words of severance, all the issue or children born in A.'s lifetime will become entitled jointly, though some may not be living when the shares of the others become vested in interest. On the death of any of them before payment, the survivors will become entitled to their shares.<sup>1</sup>

§ 160. **Severance of Joint Ownership.**—Joint ownership in chattels, like a joint tenancy in lands, is liable to severance; that is to say, one of its constituent unities may be destroyed, so as to turn the estate or interest into an ownership in common. Thus, one of the persons interested may dispose of his interest in such manner as to sever it from the joint fund; losing, likewise, his own right of survivorship. This is severance by act of one of the parties. Or, again, joint ownership can be severed by mutual agreement of the owners. And we may often find an inference raised that severance had actually taken place, where the course of dealing between the parties jointly interested sufficiently intimates that an ownership in common was mutually established, even though no express act of severance be shown. In the English chancery, where the American rule requiring express words to create a joint tenancy is not easily available, the courts frequently rely upon slight circumstances for presuming that a severance has taken place.<sup>2</sup> Deeds of severance are sometimes executed voluntarily by parties; and the operation of covenants in deeds of settlements is found to have the severing effect.<sup>3</sup>

§ 161. **Ownership in Common; Its Nature and Creation.**—Next as to a tenancy or ownership in common. An estate or interest of this kind exists where two or more hold by

<sup>1</sup> See Wms. Pers. Prop. 5th Eng. ed. 276, 277.

<sup>2</sup> See Wood, V. C., in Williams v. Hensman, 1 Johns. & H. 557. But it is held that the marriage of a daugh-

ter who is a joint legatee does not *per se* sever the joint ownership under a will. *Armstrong v. Armstrong*, L. R. 7 Eq. 518. See also [1891] 3 Ch. 59. <sup>3</sup> [1894] 1 Ch. 362.

several and distinct interests, not by a joint title but in common, the only unity recognized being that of possession. There may be a common ownership of personal property as there is a tenancy in common of real estate, and a common ownership may arise, moreover, either from the actual severance of a joint ownership or from a transfer to two or more to hold in common.<sup>1</sup> It is true that at law a *chose in action* (or incorporeal chattel) cannot be severed by joint owners thereof so as to effect an ownership in common, and this for the reason that such property is not legally assignable; but in equity the case is different, and such assignments are protected.<sup>2</sup> The sole owner of chattels may sell an undivided interest and thus create the relation.<sup>3</sup> Where two or more are made tenants in common by deed or some general instrument well written, a difficulty will seldom arise. But in wills there is greater indulgence given to informal expressions, in order to effect a testator's wishes, and it is a rule that any words which denote an intention to give to each of the legatees a distinct interest in the subject of the gift will create them common owners therein,<sup>4</sup> or in a contrary case joint tenants.<sup>5</sup>

Of course the various species of chattels which were enumerated as capable of being subjected to joint ownership may as well be owned in common. And as common owners can hold by several and distinct titles, unlike joint owners, whose title must have been created by one and the same will or other instrument, so a common ownership of chattels may arise in a variety of ways. Thus, a contract that A. shall find timber, and B. shall manufacture it into shingles and

<sup>1</sup> 2 Bl. Com. 399; 2 Kent Com. 350; Wms. Pers. Prop. 280.

<sup>2</sup> Wms. Pers. Prop. 5th Eng. ed. 280, 281. The subject of assignment is treated *supra*, §§ 72-86.

<sup>3</sup> Such interest may be designated by dollars' worth as well as by a specified fraction. 74 Mich. 652.

<sup>4</sup> Wms. Pers. Prop. 280, 281; Davis v. Smith, 4 Harring. 68; Hart v. Marks, 4 Bradf. 161; Phene's

Trusts *in re*, L. R. 5 Eq. 346; Gilpin v. Hollingsworth, 3 Md. 190; Bryan v. Twigg, L. R. 3 Eq. 433. The law now presumes that a tenancy in common was intended under the bequest of a will, unless a different intention of the testator is manifest. Stetson v. Eastman, 84 Me. 366.

<sup>5</sup> See Phelps v. Simons, 159 Mass. 415.

have a certain proportion of the number manufactured, is held to make A. and B. tenants in common of the shingles.<sup>1</sup> And parties may be tenants in common of grain which is mingled in a grain elevator before actual division has been made.<sup>2</sup> Transactions of this sort, however, border very closely upon the law of partnership, as we shall see hereafter, though there is sufficient difference left to support a distinction; as where the main object of the relation is not to sell again and trade but to own together and finally to divide among themselves. Steam-engines put up as fixtures for two or more to use as a common source of power are frequently owned by them as in common.<sup>3</sup> The simultaneous delivery of absolute bills of sale of the same personal property, one to each of two purchasers, each purchaser having knowledge of the transaction with the other, renders them owners in common; and a like principle applies to the concurrent execution and delivery of two chattel mortgages to different persons. For in the latter case the legal effect is the same as if the goods were mortgaged to them by one instrument.<sup>4</sup>

Owners in common, unlike joint owners, have, then, but one unity: that of possession. The interest of one may be larger or smaller than that of another, and it may have been acquired at a different time or in some different manner. Joint owners, like joint tenants, may be said to have their title *per my et per tout*, and each has the entire possession as well of every portion as of the whole. If there be two of

<sup>1</sup> White v. Brooks, 43 N. H. 402.

<sup>2</sup> Cushing v. Breed, 14 Allen, 376; Sexton v. Graham, 53 Iowa, 181; 61 Iowa, 648. See in vol. II., the doctrine of Confusion of Goods.

<sup>3</sup> Hill v. Hill, 43 Penn. St. 521.

<sup>4</sup> Welch v. Sackett, 12 Wis. 243. There may be tenants in common of a machine. Osborn v. Schenck, 83 N. Y. 201; Given v. Kelly, 85 Penn. St. 309. Of a yacht. Ennis v. Hutchinson, 30 N. J. Eq. 110. Of a steamboat. Coursin's Appeal, 79 Penn. St. 220. Of a horse. Goell v.

Morse, 126 Mass. 480. Of property saved from a wreck. Boylston Ins. Co. v. Davis, 68 N. C. 17. As to tenants in common of a growing crop, see Gafford v. Stearns, 51 Ala. 434; McKeithen v. Pratt, 53 Ala. 116; 113 Md. 127; 73 Mich. 582; 97 N. C. 216; Brown v. Wellington, 106 Mass. 318; Bird v. Bird, 15 Fla. 424; Creed v. People, 81 Ill. 565. There may be tenants in common of the wool growing upon sheep, under some special agreement. 14 Or. 473.

them, for instance, each one has an undivided moiety of the whole.<sup>1</sup> But with respect to a common ownership, each owner is considered to be solely and severally entitled to his share, whether it be one-half, or three-fourths, or any other proportion.<sup>2</sup> And while an ownership in common may be expressly created by will, deed, or contract, or by a change of title from joint ownership, it often arises by implication upon a legal construction.<sup>3</sup>

§ 162. *The Same Subject; Special Exceptions.* — Some of the modern kinds of incorporeal personal property are of so peculiar a nature that the principles of ownership in common cannot, as yet, be declared to apply broadly to them. Thus it is tolerably clear that letters-patent may even at law be the subject of joint or common ownership; yet the use of a patent right is different from the use of any other kind of property, and it is not safe to argue from analogy, or to apply precedents regarding a joint or common ownership which are borrowed from such chattels as horses and grain.<sup>4</sup> Whether one owner in common of letters-patent can work the patent on his own account without the concurrence of the others is uncertain.<sup>5</sup> Beneficiaries together under a life insurance policy may well be presumed joint tenants, since this is akin to a legacy from the party whose life is insured.<sup>6</sup>

<sup>1</sup> See 2 Kent Com. 359.

<sup>2</sup> There is no presumption that the interests of tenants in common are equal. But where a conveyance or deed to two or more persons does not state the interest of each, their interests are presumed equal. *Campau v. Campau*, 44 Mich. 31.

<sup>3</sup> Thus, where personal property descends and is distributed under the intestate acts, it might be said that brothers and sisters or other persons entitled as a class were as to one another like owners in common while their respective shares remained undistributed; for if one should die pending a distribution, his personal representatives, and not the survivors, would be entitled to his share. See

2 Kent Com. 368. And see U. S. Dig. Joint Tenants, 633.

<sup>4</sup> See *Vose v. Singer*, 4 Allen, 226. Hence, it is held that one jointly interested in a patent right cannot maintain a bill in equity against the other who owns it with him, to compel contribution of a portion of the profits of sales of the patented article, in the absence of a special agreement. *Vose v. Singer*, 4 Allen, 226. See *Pitts v. Hall*, 3 Blatchf. 201.

<sup>5</sup> *Wms. Pers. Prop.* 5th Eng. ed. 291; *Hancock v. Bewley*, 1 Johns. (Eng.) 601; *Grim v. Wicker*, 80 N. C. 343.

<sup>6</sup> *Farr v. Lodge*, 83 Wis. 446; *Davies Re* [1892], 1 Ch. 90.



§ 163. **Incidents of Joint and Common Ownership; As to Third Persons.**— That right of survivorship which so strongly characterizes the interest of joint owners has no application, of course, to an ownership in common. But in most other respects the incidents of joint and common ownership are quite similar; and in the few cases which discuss these doctrines, little attempt is made to discriminate between the two kinds of interests, both of them being frequently classed under the head of “joint ownership,” or of “part ownership,” which last is better applied to the peculiar relation of shipowners.<sup>1</sup> Joint owners and owners in common of a chattel have each an independent though undivided interest therein. Subject to such restrictions upon the assignment of incorporeal things as we have elsewhere noticed, each has the right to dispose of his own undivided share; but he cannot sell the whole property, nor in fact any portion except his own; and if he undertakes to dispose of any larger interest on his own responsibility, his fellow-owners are not bound thereby.<sup>2</sup> Nor can one joint or common owner pledge or mortgage the interest of the other joint or common owners; though he can either sell, mortgage, or pledge his own interest without their consent, and by such transaction the new party becomes a common owner with the others.<sup>3</sup> It matters not that the purchaser, mortgagee, or pledgee was ignorant of the existence of other parties in interest when he acquired rights in the chattel, provided they were guilty of no *laches*; for it is a general principle that the seller can convey no greater title than he has; but to the extent of his own title, and subject, we may suppose, to the usual exceptions in favor of negotiable instruments, the transaction will be upheld. In case property is sold under a chattel mort-

<sup>1</sup> See *post*, as to Shipowners.

<sup>2</sup> *White v. Brooks*, 43 N. H. 402; *Russell v. Allen*, 13 N. Y. 173; *Story Partn.* § 89; *Goell v. Morse*, 126 Mass. 480; *Perry v. Granger*, 21 Neb. 579.

<sup>3</sup> *Ib.*; *Frans v. Young*, 24 Iowa, 375; *Welch v. Sackett*, 12 Wis. 243.

A co-owner may separately insure his interest against fire, and in case of loss recover and retain the insurance; for this is taking no title or advantage to the prejudice of his co-owner. *Harvey v. Cherry*, 76 N. Y. 436.

gage, the proceeds should be divided among the co-owners in proportion to their several interests.<sup>1</sup>

So, too, the share of a joint or common owner in a chattel may be taken and sold in execution against him. But the sheriff has no right to take and sell, on an execution issued against only one or more of several joint or common owners, the entire chattel; and where he has done so, the injured co-owner may sue him for his own share in the proceeds; or, perhaps, regarding him as a trespasser, prevent him in season from taking exclusive possession of the thing and selling it at all.<sup>2</sup> The practical difficulty which would thus be encountered where the chattel was indivisible, like a horse, is quite apparent. For the rule appears to be general that if two persons own personal property, jointly or in common, one of them may maintain an action against any third person who appropriates the whole to the exclusion of the joint or common interest; in respect at least of his own portion.<sup>3</sup> On the other hand, the undivided interest of a co-owner of chattels may be seized and sold in attachment or execution if the property is severable.<sup>4</sup>

But the ordinary presumption is that the sole possession of a chattel by one joint or common owner is the possession

<sup>1</sup> See *Welch v. Sackett*, 12 Wis. 243. Where one of two tenants in common has paid his share of a joint mortgage, and the other has mortgaged his portion a second time, the former is entitled to a discharge. *Southworth v. Parker*, 41 Mich. 198.

If one, disregarding the rights of his co-owner, authorizes a third person to sell a horse and receives the proceeds to himself, it is a conversion for which the co-owner may sue both wrong-doers. *Goell v. Morse*, 126 Mass. 480. And see *Needham v. Hill*, 127 Mass. 133; *Russell v. Russell*, 62 Ala. 48; *Williams v. Brassell*, 51 Ala. 397. Or the co-owner may sue to recover his proportion of the price. *Wright v. Searles*, 59 How. (N. Y.) Pr. 176. The co-owner who is wronged may either repudiate the

sale and sue for conversion, or he may ratify it and sue for his share of the proceeds. *Perry v. Granger*, 21 Neb. 579.

The sale by one co-owner without leave of the other, is an ouster and conversion, and the co-tenant may follow the chattel into the hands of a purchaser, or recover its value from the wrong-doer. *Coursin's Appeal*, 79 Penn. St. 220.

<sup>2</sup> *Neary v. Cahill*, 20 Ill. 214; *White v. Morton*, 22 Vt. 15; *Sheppard v. Shelton*, 34 Ala. 652; *Hayden v. Binney*, 7 Gray, 416.

<sup>3</sup> See *Bryant v. Clifford*, 13 Met. 138; *Boobier v. Boobier*, 39 Me. 406; *Goell v. Morse*, 126 Mass. 480.

<sup>4</sup> *Newton v. Howe*, 29 Wis. 531; *Boylston Ins. Co. v. Davis*, 68 N. C. 17.

of all; and especially must this be true of indivisible personal property.<sup>1</sup> And if a thing is owned in this way all appear to be equally entitled to the possession of it, and the one in actual possession has a right to maintain that possession against the others. Courts were not long since ill-disposed to meddle in such cases; and the owner out of possession was usually left to await his opportunity and take the chattel when he could; though it is possible that where the chattel was in danger of being injured or destroyed by a party in possession who would be unable to respond in damages, or carried wholly without the jurisdiction, a court of equity would require him to deliver possession to the other owners, or else give security against its injury or destruction; a similar rule being applied sometimes in admiralty where part-owners of a ship fail to agree as to its employment.<sup>2</sup>

§ 164. *Remedies of Joint and Common Owners against Third Persons.*—In general, joint owners, and owners in common of chattels must join in all actions relating to the property; since otherwise there would be a multiplicity of suits.<sup>3</sup> Hence, if a bond or covenant be given or made to two or more jointly, all must join in suing upon it; and so with any joint contract; and the joint owners of personal property are properly joined in an action of replevin to recover possession.<sup>4</sup> Hence, too, all the owners should join in trover or trespass for conversion or injuries to the property, or in assumpsit for money received by a third person from a sale of their common property; and so on.<sup>5</sup> But non-joinder, in such case, is usually matter of abatement; and there may be legal and sufficient cause why certain co-owners are not joined.

<sup>1</sup> *Brown v. Graham*, 24 Ill. 628; *Swartwout v. Evans*, 37 Ill. 442. See *Buckmaster v. Needham*, 22 Vt. 617; § 200, *post*.

*Southworth v. Smith*, 27 Conn. 355.

For application of the rule of limitations to the possession of one, see *Bowen v. Preston*, 48 Ind. 367; *Baker v. Chase*, 55 N. H. 61; *Harral v. Wright*, 57 Ga. 484.

<sup>2</sup> See *Southworth v. Smith*, 27 Conn. 355; *Conover v. Earl*, 26 Iowa, 167;

<sup>3</sup> *May v. Parker*, 12 Pick. 34; *Lane v. Dobyns*, 11 Mo. 105.

<sup>4</sup> *Wms. Pers. Prop.* 3d Am. ed. and n.; *Sims v. Harris*, 8 B. Monr. 55; *Glover v. Austin*, 6 Pick. 209; *Eisenhart v. Slaymaker*, 14 S. & R. 153.

<sup>5</sup> *White v. Brooks*, 43 N. H. 402; *U. S. Dig. Joint Tenants*, 635; *Little v. Harrington*, 71 Mo. 390.

Where, it is said, the moving cause of action of two or more joint covenantees is several and not joint, each may maintain his several action on the covenant; thus, there are instances, such as that of several persons being interested in a fund, where one is paid and the others are not; or where one seeks his share in the surplus proceeds of a sale on execution.<sup>1</sup> It is held that if a co-owner wrongfully sells and converts the common property, and the purchaser again sells it for money, the other co-owner may bring his sole action of trover against the first purchaser, or else waive the tort and sue as for money had and received, to recover his interest in the proceeds of the sale by the first purchaser.<sup>2</sup> An action cannot be sustained in the name of two where one has no legal interest left in what was common property, having assigned it to his co-owner;<sup>3</sup> though a third person may practically take the place of a co-owner by assignment.<sup>4</sup> In a strong emergency, as where his co-owners refuse to join him and are non-residents, the co-owner of personal property has been allowed to sue separately a third person for a wrong done to the thing.<sup>5</sup> And the part owner who is in sole possession is sometimes favored in such suits.<sup>6</sup>

Bills and promissory notes are sometimes owned jointly or in common; and it is fair to presume that the single holder of such a chattel may sell distinct shares to different persons and thus make them co-owners. In the mercantile community, to be sure, those who own a bill or note together are usually to be deemed partners or *quasi* partners; and their rights and liabilities are determined accordingly. But such

<sup>1</sup> Wms. Pers. Prop. 3d Am. ed. 276, and n.; Parker v. Elder, 11 Humph. 547; Catawissa R. R. Co. v. Titus, 49 Penn. St. 277; Bailey v. Powell, 11 Wis. 419.

<sup>2</sup> White v. Brooks, 43 N. H. 402. See Bates v. Marsh, 33 Vt. 122; *supra*, p. 201, n. Where there are parties to a joint contract and one or more of them dies, of course, on the principles of joint ownership, the survivor or survivors must sue; and if all are dead, the representatives of

the last survivor. Stowell v. Drake, 3 Zab. 310; Wms. Pers. Prop. 276, Am. note.

<sup>3</sup> Murdock v. Chenango, &c. Ins. Co., 2 Comst. 210.

One having a joint interest may proceed alone to recover possession from a mere trespasser. Lannes v. Courege, 31 La. Ann. 74.

<sup>4</sup> See 80 N. C. 343.

<sup>5</sup> Peck v. McLean, 36 Minn. 228.

<sup>6</sup> Hasbrouck v. Winkler, 48 N. J. L. 431.

is not always the case ; and where a note is payable to A. and B. jointly, it should, according to the better authorities, be indorsed by each ; and if the note is afterwards dishonored, notice should be sent to each, and not to one only.<sup>1</sup>

§ 165. **Rights and Remedies of Co-owners among themselves.**

— But what are the rights and remedies of joint and common owners as among themselves ? If the property is an indivisible chattel, like a horse or a mowing-machine, the common law affords very little comfort to the party who happens to be out of possession. The exclusive possession being in one, the other's legal remedy is in general to take it back when he can ; for though the possessor thereby prevent the other from fairly using the chattel, this is not such a conversion of the thing as to justify the co-owner in a suit.<sup>2</sup> Ordinarily, nothing short of a destruction of the chattel, or a conversion of the whole to his own use, or a clear appropriation of the whole proceeds of a sale, or something equivalent to an utter denial of the co-ownership rights, will render the owner in possession liable to his co-owners. It is a little uncertain, however, what acts constitute a conversion, so as to justify a suit at law.<sup>3</sup> A mere dispossession certainly does not

<sup>1</sup> See *People's Bank v. Keach*, 26 Md. 521 ; *Willis v. Green*, 5 Hill, 232 ; 2 Dougl. 653, *n.* But as to joint makers, see *Union Bank v. Willis*, 8 Met. 504, *contra* ; *Harris v. Clark*, 10 Ohio, 5 ; *Allen v. Harrah*, 30 Iowa, 370 ; *Cooper v. Bailey*, 52 Me. 230. A co-owner held not liable for personal injuries to a third person inflicted by an animal which has escaped from his co-owner's sole possession. 40 Hun, 339.

<sup>2</sup> *Allen v. Harper*, 26 Ala. 686 ; *Southworth v. Smith*, 27 Conn. 355 ; Co. Lit. 199 *b* ; *Bertrand v. Taylor*, 32 Ark. 470.

<sup>3</sup> The secret removal of the entire property by one of several common owners without the consent or knowledge of the others, and for the purpose of selling and applying the proceeds to his own use, has been

held not to amount to a conversion. *Jones v. Brown*, 38 E. L. & Eq. 304. Nor even the sale of the property to a stranger by one common owner or his agent. *Barton v. Burton*, 27 Vt. 93. But see next paragraphs ; *Goell v. Morse*, 126 Mass. 480 ; *supra*, § 163. One common owner of a chattel cannot sue the other for a conversion, unless the common property is destroyed, carried beyond the State jurisdiction, or, when perishable, so disposed of as to prevent the other from recovering it. *Grim v. Wicker*, 80 N. C. 343 ; 89 N. C. 149. The sale by one of two or more co-owners to himself is open to suspicion of fraud. 16 N. Y. Supr. 418. A sale of the entire interest in a personal chattel, in which there is a reversion, whether by the tenant of the particular estate or by a stranger, is an injury to the

amount to conversion, though dispossession might, if amounting to total expulsion or accompanied by other acts showing a hostile intent. The protest or demand of the aggrieved party should make the wrong clear.<sup>1</sup> The right to exclusive possession may follow as an incident of the power to sell, where co-owners have agreed to give the latter power to some one or more of their number ; in which case those invested with the right are liable to account for the proceeds of the sale.<sup>2</sup>

One co-owner cannot maintain replevin against the other with respect to the joint or common property.<sup>3</sup> Nor as a general rule can he maintain an action against his co-owner either to recover their common specific chattel or for his undivided interest therein ; its mere detention by the other party affords him, moreover, no relief.<sup>4</sup>

This apparent indifference of the common law to the rights of a dispossessed co-owner in chattels does not commend itself to the courts of our own land at the present day. Equity suggests other possible expedients besides suits in trover and conversion.<sup>5</sup> The statutes of some States permit an action at law to be brought by the aggrieved co-owner where his fellow-owner simply exercises exclusive control, and takes the beneficial enjoyment to himself.<sup>6</sup> What the co-owners

reversion, for which the reversioner may maintain a special action on the case ; and, although he afterwards regains the possession, before the termination of the particular estate, or himself becomes the purchaser at the sale, neither of these facts is, of itself, a bar to the action. *Williams v. Brassell*, 51 Ala. 397.

<sup>1</sup> See 108 N. C. 289.

<sup>2</sup> See *Corbett v. Lewis*, 53 Penn. St. 322 ; 74 Mich. 653.

<sup>3</sup> *Russell v. Allen*, 13 N. Y. 173 ; *Busch v. Nester*, 70 Mich. 525. See *Hardy v. Sprowle*, 32 Me. 322.

<sup>4</sup> *Balch v. Jones*, 61 Cal. 234 ; *Heller v. Hufsmith*, 102 Penn. St. 533.

<sup>5</sup> See *Southworth v. Smith*, 27 Conn. 355.

<sup>6</sup> See *Benjamin v. Strempel*, 18

Ill. 466 ; *Boyle v. Levings*, 28 Ill. 314 ; *Needham v. Hill*, 127 Mass. 133. In Alabama a trial of the right of property may be maintained whenever personal property is seized under legal process, when trespass, trover, or detinue would lie against the officer making the seizure. *Abraham v. Carter*, 53 Ala. 8. The policy of some local codes, in case of divisible personal property which is owned in common, is to make the aggrieved co-owner's right of action complete upon a demand in writing for his share or its value. 84 Wis. 398. Under a Rhode Island statute, if one co-owner excludes the other from enjoyment of the thing, the aggrieved co-owner is entitled to an account. 15 R. I. 312.

have previously agreed upon together may determine their respective rights and remedies.<sup>1</sup> And, what is more especially worthy of our attention, there are a number of decisions, relating chiefly to oats, hay, grain, and gathered crops, readily divisible, wherein the exclusive appropriation or the sale by one of the joint or common owners, with a full retention of the proceeds, has been treated as a conversion sufficient to justify his fellow-owners in suing him in trover. The reason for this exception to the general rule is sometimes said to be that the chattel is of such a nature as to be necessarily destroyed by its use.<sup>2</sup> But the more satisfactory because the more comprehensive reason may be found in the distinction which is afforded between divisible and indivisible personal property. The fact that one takes into his possession and uses exclusively a horse or machine for the time being, does not necessarily prove that he means to repudiate the rights of the others; since the property, if not used in some such way, could hardly be used at all. But where the property is in its nature divisible, like money and grain, requiring no act of sorting or setting apart, and each co-owner might and ordinarily would carry off his own share, the presumptions are quite different where one takes the whole into his custody and refuses to give up any portion. And there is often a corresponding difference apparent in the matter of a sale in these two species of property. But the right to enjoy and dispose, even of divisible property, as between joint and common owners, may be regulated by their own agreement among themselves.<sup>3</sup>

Any such misuse of the joint or common property as amounts to destruction or spoliation thereof constitutes conversion, and authorizes a suit by or on behalf of the injured

<sup>1</sup> See [1892] 2 Q. B. 202. And one co-owner trusted by the others to take possession for the common benefit will be held to account accordingly. 89 Mich. 233.

<sup>2</sup> *Lowe v. Miller*, 3 Gratt. 205; *Channon v. Lusk*, 2 Lansing, 211; *Smythe v. Tankersley*, 20 Ala. 212; *Freese v. Arnold*, 99 Mich. 18. Trover

lies for using hay, but not for selling it. 59 Vt. 383. Wool from a whole flock does not come within such exceptions. 37 Hun, 594. For conversion of promissory note, see *Winner v. Penniman*, 35 Md. 163.

<sup>3</sup> See *Crooker v. Carson*, 33 Me. 436.

parties. But the usual and legitimate exercise of the right of enjoyment is no such spoliation or destruction. Under some circumstances, a co-owner of machinery may take it out of the mill where it is usually kept and set it up in his own mill; but the case must be very strong to justify such a proceeding; and the disseverance and removal of heavy and strongly fastened machinery, which is in working order, from the mill where it belongs, ought generally to justify a suit on the ground of its practical destruction or spoliation.<sup>1</sup> Sometimes a co-owner may alter the nature of the chattel while turning it to its ordinary and valuable use, and yet not render himself liable, as where he extracts oil from the whale; for instead of destroying the property, though changing its form, he prevents it from deteriorating in value. But to mix iron owned in common with other iron, melt the whole into an undistinguishable mass, and manufacture new articles from this mass, would amount to a conversion.<sup>2</sup> And so would dismantling or so disposing of machinery as to render it unfit for its proper use.<sup>3</sup>

§ 166. **The Same Subject; Contribution, Partition, etc.**—The law favors remedies by one joint or common owner against another to recover his share, not only in the proceeds of a sale, but in the income or profits of the joint or common property, wherever such share has been withheld from him against his consent; and remedies of this sort are sometimes extended by statute.<sup>4</sup> Thus, where co-owners sell and one receives the entire purchase-money, the other can maintain

<sup>1</sup> Cf. *Dodd v. Watson*, 4 Jones Eq. 48; *Symonds v. Harris*, 51 Me. 14; *Benedict v. Howard*, 31 Barb. 569.

<sup>2</sup> *Redington v. Chase*, 44 N. H. 86. See *Fennings v. Grenville*, 1 Taunt. 241; *Agnew v. Johnson*, 17 Penn. St. 373.

<sup>3</sup> *Given v. Kelly*, 85 Penn. St. 309. It is held that the taking of a chattel mortgage on the property from a co-owner as security for his debt is no conversion by the mortgagee, even though the giving it be a conversion by the mortgagor (as to which, *gw.*);

and that even the taking possession of the thing on default of the mortgagor, is no ouster of the co-owner's right, so as to enable him to sue the mortgagee without demand. A conversion must be established, or at least a possession so hostile as to exclude the co-owner's beneficial enjoyment or fully ignoring his right. *Osborn v. Schenck*, 83 N. Y. 201; 127 Mass. 183.

<sup>4</sup> See *Dyer v. Wilbur*, 48 Me. 287; *White v. Brooks*, 43 N. H. 402; *Bennet v. Bullock*, 85 Penn. St. 364.



an action for money had and received to recover his proportion.<sup>1</sup> Herein joint and common owners have an advantage over partners, who cannot sue at law, but must bring a bill in equity for a mutual settlement of accounts.<sup>2</sup> Compensation for individual services in managing or taking care of the property is not favored, where a co-owner claims it, except upon the basis of a mutual understanding.<sup>3</sup> Where a co-owner acquires an outstanding adverse title, he may be presumed to take it for the benefit of all the co-owners, subject to their liability for contribution to the cost; and so too where he removes an incumbrance.<sup>4</sup> But while one ought not to be permitted to get a paramount advantage so as to oust his co-owner, there is no reason why he may not fairly buy in the independent interest of another co-owner similarly situated and gain control by such means.<sup>5</sup>

What course shall be pursued for obtaining a partition of chattels held by co-owners must be left somewhat to reason and conjecture. No action lies at law for the partition of personal property; but any oral and voluntary partition which has been framed and carried into effect by the parties themselves, each taking his allotted share, is a valid one.<sup>6</sup> Common sense suggests that the co-owners of a single indi-

<sup>1</sup> 59 How. (N. Y.) Pr. 176.

<sup>2</sup> But see *Vose v. Singer*, 4 Allen, 226. And see *Coursin's Appeal*, 79 Penn. St. 220, to the effect that the proceeds of sale of a chattel by one co-owner cannot be followed by the other into any business into which the wrong-doer may have invested it so as to hold him to account for the profits.

Where one tenant in common, on the refusal of the other to join him, makes necessary repairs, for the benefit and preservation of the joint property, he may maintain a bill in equity against his co-tenant for contribution. *McDearman v. McClure*, 31 Ark. 559. See further, *Newman v. Newman*, 27 Gratt. 714; *Tallman v. Barnes*, 54 Wis. 181.

<sup>3</sup> *Fuller v. Fuller*, 23 Fla. 236. But a mutual understanding on this point should be respected. *Barry v. Coville*, 129 N. Y. 302.

<sup>4</sup> *Burgett v. Talliaferro*, 118 Ill. 503; *Dray v. Dray*, 21 Or. 59; *Moon v. Jennings*, 119 Ind. 130; *Turner v. Sawyer*, 150 U. S. 578. Adverse possession by an owner in common, will only run from the time when knowledge was brought home to his co-owner. 83 Wis. 364; 3 C. C. A. 294. The possession of a tenant in common is not usually to be considered adverse where there is no ouster nor an equivalent act. See 108 Penn. St. 595.

<sup>5</sup> See *Snell v. Harrison*, 104 Mo. 158.

<sup>6</sup> *Bruce v. Osgood*, 113 Ind. 360.

visible chattel, who desire a final severance of the thing, sell it and take their respective shares in the proceeds, unless one buys out the other; and if co-owners cannot agree to thus dispose of the property, a court of equity will afford relief.<sup>1</sup> As to personal property which is severable in its nature and lies in common bulk of the same quality, each co-owner may sever and appropriate his own share at any time, if it can be determined by measurement, count, or weight; and whether he sell, consume, or destroy it, this matters nothing to the other co-owners so long as their respective shares are not injured thereby. Not only is the consent of the other co-owners, in absence of controlling stipulations, unnecessary to the completion of a severance in this manner, but they have no right to take the property into their exclusive keeping so as to prevent him from severing his interest.<sup>2</sup> Furthermore, the co-owner's share in personal property severable by weight, measurement, or count, may be demanded of the co-owner having possession of the whole; and, on the latter's refusal or conversion, the former may sue in his own name for his share without joining all the other co-owners.<sup>3</sup> Where a sale of the whole property has actually taken place, any one of the co-owners may recover his share from the purchaser without joining other co-owners; and in this way, by ratifying the wrongful transfer of his co-owner, may an aggrieved party clear himself of the whole inconvenient relation.<sup>4</sup>

§ 166 a. **The Same Subject; Partition in Equity.** — Partition between co-owners is a matter of individual right; and hence, as legal remedies are confessedly inadequate, any court

<sup>1</sup> *Barney v. Leeds*, 54 N. H. 128. See § 166 a; *Ennis v. Hutchinson*, 30 N. J. Eq. 110.

<sup>2</sup> See *Fobes v. Shattuck*, 23 Barb. 568; *Tinney v. Stebbins*, 28 Barb. 290. One tenant in common of a chattel may recover from another money expended beyond his due proportion under some circumstances of express or implied contract. *Gardner v. Cleveland*, 9 Pick. 384. And

see U. S. Dig. Joint Tenants, 634; *McDearman v. McClure*, 31 Ark. 559. Such expenditures or services rendered may be set off in action *ex contractu*, but not in defence of trover, which is in tort. *Russell v. Russell*, 62 Ala. 48.

<sup>3</sup> *Lobdell v. Stowell*, 51 N. Y. 70; *Stall v. Wilbur*, 77 N. Y. 158.

<sup>4</sup> *Lyman v. Boston & Maine R.*, 58 N. H. 384; 21 Neb. 579.

having general equity jurisdiction to grant partition, may do so upon the application of any owner of personal property in common whose title is clear; nor can the unwillingness of the other party or parties defeat this right.<sup>1</sup> An actual partition of the property is the preferred relief thus afforded; but if division be impracticable, a sale of the chattel or chattels will be ordered with an accounting and division of the proceeds.<sup>2</sup> Whichever method be adopted, the same equitable principles and the same just regard for the several interests involved should apply. Common owners or tenants of a life estate can maintain such a suit;<sup>3</sup> even an undivided fractional part of the whole common property is sometimes set off upon petition;<sup>4</sup> and an owner in common out of possession may gain his cause notwithstanding the co-owner has the actual and exclusive possession.<sup>5</sup> The co-owner is not compelled to defer his right of partition in the hope of some future speculative rise of value;<sup>6</sup> nor have third persons, such as creditors of a co-owner, any right to intervene in such judicial proceedings.<sup>7</sup> But the court which partitions will properly ascertain in advance the respective interests in the property.<sup>8</sup>

§ 167. **Disadvantage of Joint or Common Ownership.**—If the doctrines of a joint and common ownership in things personal appear rather vague, meagre, and unsatisfactory, this is doubtless because they are so seldom applied in the courts. To adjust controversies between those who are so unfortunate as to have once become chattel communists, and to determine how far each proprietor shall enjoy or dispose of what ought to be either sold and divided or else managed upon some special agreement, is a task which the judiciary are reluctant to assume. If persons have money to invest or chattels whose use is likely to bring in profit, and their

<sup>1</sup> Willard v. Willard, 145 U. S. 116; Spaulding v. Warner, 59 Vt. 646; Kennedy v. Boykin, 35 S. C. 61; Godfrey v. White, 60 Mich. 443.

<sup>2</sup> *Ib.* Statutes are found in furtherance of such remedies. 145 U. S. 116. Sale at public auction is favored generally. 39 La. Ann. 804.

<sup>3</sup> 125 Ind. 597. And see 91 Ala. 273.

<sup>4</sup> 90 Ala. 164.

<sup>5</sup> Barker v. Jones, 62 N. H. 497.

<sup>6</sup> 44 La. Ann. 931.

<sup>7</sup> Stevens v. McCormick, 90 Va. 735.

<sup>8</sup> As to a tenant in common not in actual possession, whose title is disputed, see 47 Ark. 235.

desire is to mass their several interests together for some joint business operation, without organizing a company, they will be most likely to find themselves drawn into partnership: a relation which involves greater risks, but is far better adapted to the wants of a mercantile community, than that of either a joint or a common ownership. It is this relation of partnership which we shall proceed to examine in our next chapter.

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## CHAPTER IX.

### PARTNERS.

§ 168. **The Partnership Relation, for the Ownership of Personal Property.** — Personal property is not the subject of several, joint, and common ownership alone. Capital is employed in trade and commerce so as to be productive of the largest possible profit by means of close combinations among individuals for the pursuit of gain. Two or more persons unite in business, each furnishing something valuable, whether it be money capital or skill; and by the consolidated credit thus obtained, a larger influence is wielded in the mercantile community, and bolder enterprises may be successfully carried out, than where individuals act separately and singly. Thus we have the law of partnership, which in some respects resembles that of co-ownership, and yet is so far distinct and independent as to constitute by itself an important and ever-growing topic of jurisprudence in modern times. The prime object of partnership is to sell, gain, and do business with the common fund; not, as in joint and common ownership, to hold property for a beneficial enjoyment.

The origin of the law of partnership is somewhat uncertain; but it is built upon the law-merchant, which is of itself nothing but the custom of merchants, adopted, enforced, and reduced to a legal system by the courts, as in so many other instances of common-law development. With the growth

of trade in modern times, this mercantile usage has extended and developed to a wonderful extent; and especially in the United States, where, by reason of our social freedom, the abundant rewards which await hardy enterprise in a new and growing country, and at the same time the comparative lack of large capital which prevails among our energetic men, this principle of business combination has taken deep root. Commercial partnerships were known to the Romans; and their system too was founded upon the usages of business, and indeed inspired much of our modern partnership law. England borrows from the United States in these later days many important principles relative to the subject in its fullest development; since it is here, and not there, that the rights and duties of partners occupy the largest share of attention from the courts.<sup>1</sup>

§ 169. *Division of Subjects in the Present Chapter.*— We shall, in this chapter, consider, *first*, the nature, creation, and general purposes of partnership; *second*, the rights and duties of partners to themselves and to the public; and, *third*, the dissolution and change of partnership. At the same time our attention will be mainly occupied, as befits a treatise like the present, in showing the reader how the ownership of personal property is affected by the relation of persons holding it among themselves as partners.

§ 170. *Nature, Creation, and Purposes of Partnership.*— And, first, as to the nature, creation, and general purposes of partnership. Partnership may be defined as a legal entity formed by the combination by two or more persons of capital or labor or both, for the purpose of carrying on some lawful business for their common benefit, and dividing its profits.<sup>2</sup> But as to the essential characteristics of a partnership the law is not very precise. We shall see hereafter that a corporation is likewise a legal entity formed by an association of persons for carrying on business for a common profit,

<sup>1</sup> See Pars. Partn. 2d ed. c. 1, 4th ed.; 3 Kent Com. 23; Coll. Partn. § 2; Smith Merc. Law, 20; Smith Com. Law, 1st Am. ed. 194; Pars. § 1; Story Partn. c. 1. Partn. 4th ed., §§ 1-6; Bouvier's Dict.

<sup>2</sup> 3 Kent Com. 23; Coll. Partn. "Partnership."

though differently organized. Of course, the partnership combination is founded upon some contract express or implied. So, the combination of capital, whether consisting in money or goods, and of labor, whether it be skilled labor or not, may be in any proportion agreed upon. Furthermore, while the object is that of common benefit or profit, the relation usually extends to a community of loss as well as of gain. The word "firm" is often used synonymously with partnership. It is said that whether a partnership exists is a question of fact; but what constitutes a partnership is a question of law.<sup>1</sup>

Some kind of a contract must be made in order to constitute a partnership combination, and this contract must have been executed. An agreement in writing to become partners is commonly designated by the name of "articles of partnership." But the partnership contract need not be in writing; it may be verbal.<sup>2</sup> Not even an express verbal contract is necessary; for a partnership may grow out of transactions or relations in which the word "partner" is not uttered, and it is often to be gathered from the conduct of the parties. From that joinder of interests and conduct which the law considers equivalent to partnership, the agreement of persons to become partners, sometimes for an extensive business, and sometimes in a single transaction, will be inferred.<sup>3</sup>

But to constitute a legal partnership, the contract must be for legitimate purposes. Hence, combinations formed for smuggling, gambling, and making counterfeit bills are not partnerships at all; for on general principles such a contract of parties would be illegal and void.<sup>4</sup> And where a govern-

<sup>1</sup> Pars. Partn. § 6, and cases cited; *Gabriel v. Evill*, 6 Car. & M. 358. The word "entity" is brought out in modern American cases. *Cross v. Burlington Bank*, 17 Kans. 336; *Robertson v. Corsett*, 39 Mich. 777; *Walker v. Walt*, 50 Vt. 688.

<sup>2</sup> Pars. Partn. 6. But cf., as to a possible distinction, *Cutler v. Thomas*, 25 Vt. 73. According to the weight of authority, a partnership may be verbal even if formed for the purpose of dealing in land, though some authorities require a writing. Pars. Partn. § 6, 4th ed. and notes.

<sup>3</sup> Pars. Partn. § 7; *Story Partn.* § 86; *Smith Com. Law*, 194.

<sup>4</sup> Pars. Partn. § 8, and cases cited. See as to winding up an illegal partnership, *Brooks v. Martin*, 2 Wall. 70; *Sykes v. Beadon*, 11 Ch. D. 170; 120 Mass. 9, 18.

ment officer contracted for the building of a fort, stipulating fraudulently for a share in the profits, it was held that no partnership had been thereby created.<sup>1</sup> Restrictions upon the formation of partnerships have sometimes been imposed by statute; as in England, where a statute made it unlawful for a partnership beyond six persons other than the Bank of England to carry on the banking business.<sup>2</sup> Such legislation is sometimes founded upon a just policy; but more commonly it is for the purpose of securing to certain favored monopolies the sole enjoyment of their peculiar business with all accruing gains. In general, partnerships are permitted to exist by our law for all legitimate purposes, and indeed it is corporations rather than partnerships that in our day unite numerous interests.

The agreement to constitute a partnership, like other agreements, must be voluntary; that is to say, each and every partner must of his own free will enter into it. But, in conformity with general principles, the assent of a partner need not be testified in express terms, for it may be tacit and inferable from the acts and conduct of the parties. And simple reluctance to enter into a partnership is superseded by the fact that the assent to enter was finally given.<sup>3</sup> A mere agreement to admit a new partner does not of itself constitute a partnership, though the breach of it might lay the foundation for an action for damages. The choice of persons is favorably regarded in the formation of a partnership, and fraud or coercion would certainly vitiate the contract<sup>4</sup> and justify a court of equity in rescinding it at the instance of the injured party.

§ 171. **The Same Subject; Competency of Parties to become Partners.** — As to the personal competency of parties to the agreement of partnership, the legal disabilities are much the same as in ordinary contracts; and the usual exceptions are those of infants, married women, insane persons under guar-

<sup>1</sup> *Bartle v. Coleman*, 4 Pet. 184.

<sup>3</sup> *Mason v. Connell*, 1 Whart. 381;

<sup>2</sup> Stat. 6 Anne, c. 22, § 9. See *Pars. Partn.* § 8; *Hodgson v. Temple*, 5 Taunt. 181; Stat. 6 Geo. I. c. 18, § 12.

*Pars. Partn.* § 9, and cases cited.

<sup>4</sup> *Tattersall v. Groote*, 2 Bos. & P. 131; *Freeborn v. Smith*, 2 Wall. 160; *Pars. Partn.* § 10; 145 U. S. 578;

dianship, and alien enemies ; to which may be added corporations. Infants, being in strictness bound only by their contracts for necessities, would of course be undesirable partners, even if possessed of good business experience.<sup>1</sup> As to married women, the common-law disability to trade is founded in the peculiar nature of the marriage relation rather than any presumed business incapacity on the wife's part ; for spinsters and widows are free to trade, and may enter, we suppose, into the partnership relation with whomsoever they choose. And now that our statutes allow even married women to trade with considerable freedom, it is fair that they should be permitted to enter into partnership relations for this purpose.<sup>2</sup> But female delicacy suggests strong reasons for opposing close partnership combinations with those of the opposite sex ; while a practical difficulty must still be found in the case of married women,—that of establishing such credit as may induce others to trade extensively with them ; nor in general has woman's taste been found to favor business pursuits hitherto upon a business responsibility, even where she has been driven to earn her own living. So that, except it be as a limited partner, or by way of an investment, a woman of capital, whether married or single, is not likely to embark her fortunes in extensive trade. An alien friend can be a partner ; but an alien enemy cannot. This is a doctrine of public law. And while a commercial partnership with an alien in times of peace is not uncommonly found, yet if war broke out between the two countries such a partnership would be entirely suspended, if not annulled altogether.<sup>3</sup> A firm consisting wholly of aliens may have an agency in this country.<sup>4</sup> Insane persons under guardianship, being

\* Story Partn. § 5 ; Mason v. Connell, 1 Whart. 381.

<sup>1</sup> See Schoul. Dom. Rel. § 163 ; Pars. Partn. §§ 11, 15. But see Avery v. Fisher, 28 Hun, 508.

<sup>2</sup> See Schoul. Dom. Rel. § 163 and cases cited. Pars. Partn. §§ 19-21 ; Rittenhouse v. Leigh, 57 Miss. 697 ; Penn v. Whitehead, 17 Gratt. 503.

<sup>3</sup> Griswold v. Waddington, 15

Johns. 57 ; Clementson v. Blessing, 11 Ex. 135, n. ; Scholesfield v. Eichelberger, 7 Pet. 585 ; Co. Lit. 129 b. ; Woods v. Wilder, 43 N. Y. 164 ; 37 N. J. L. 444 ; 50 N. Y. 610 ; Kershaw v. Kelsey, 100 Mass. 561 ; Pars. Partn. § 22.

<sup>4</sup> Local statutes or treaties have considerable bearing upon the rights of aliens in any country.



incapable of managing their own affairs, are of course incapable of entering into a valid partnership, and the same may be said of spendthrifts subjected to the condition of wards, for like reasons.<sup>1</sup> As to a corporation, which is only a legal person, though it may incur a liability to third persons as a *quasi* partner, it would seem that it cannot enter into a full copartnership either with another corporation or with an individual, unless its charter gives adequate power.<sup>2</sup>

§ 172. *The Same Subject; Purposes and Scope of Partnership.*—The purposes for which a partnership may be formed are manifold. Such combinations are usually for the transaction of some particular branch of trade or commerce; but this is not essential to constitute persons legal partners. There may be a partnership in almost any occupation. It may exist between lawyers, conveyancers, physicians, artists, brokers, farmers, and mechanics; it may be for stage-driving, fishing, hunting, mining, or manufacturing.<sup>3</sup> And, subject to the usual local formalities attending such property, it is settled that there may also be a partnership for the buying and selling of lands.<sup>4</sup> But there can be no partnership in public offices filled upon the principle of personal selection and involving a personal responsibility; nor in such an office as that of guardian, trustee, or executor, though the trust be jointly assumed.<sup>5</sup> Nor are joint patentees copartners;<sup>6</sup> nor the mere joint purchasers of land.

<sup>1</sup> *Menkins v. Lightner*, 18 Ill. 282.

<sup>2</sup> See *Sharon Canal Co. v. Fulton Bank*, 7 Wend. 412; *post*, Corporations; Pars. Partn. § 240, notes; *Gunn v. Central R.*, 74 Ga. 509; 10 Gray, 582; 86 Tenn. 598; 12 Or. 124. But its charter may confer such power. *Butler v. Toy Co.*, 46 Conn. 136. And as to these disabilities in general, see Pars. Partn. § 23; Story Partn. §§ 7, 9, 11, *et seq.*; Lindley, 74, 77, 79.

<sup>3</sup> 3 Kent Com. 28; Cowp. 814; *Coope v. Eyre*, 1 H. Bl. 37; *Waugh v. Carver*, 2 H. Bl. 235; Pars. Partn. §§ 37, 38; *Allen v. Davis*, 13 Ark. 28.

As to partners in a ferry, see *Bowyer v. Anderson*, 2 Leigh, 550. As to mining partnerships which are non-trading, see § 204, note.

<sup>4</sup> See 3 Kent Com. 28, and cases cited in notes; *Fall River Co. v. Borden*, 10 Cush. 458; *Dale v. Hamilton*, 5 Hare, 369; *Ludlow v. Cooper*, 4 Ohio St. 1; *Chester v. Dickenson*, 54 N. Y. 1; *Shaeffer v. Blair*, 149 U. S. 248.

<sup>5</sup> Pars. Partn. § 39. See *Caldwell v. Lieber*, 7 Paige, 483.

<sup>6</sup> *Pitts v. Hall*, 3 Bl. C. C. 201. Buying a threshing-machine jointly to do a threshing business, &c. con-

It is manifest that, according to the range of the undertakings assumed by those who come together as partners, a partnership may be what is called either general or special; that is, may embrace all things within the general scope of a line of business, or it may be limited to a special subject in that line or a particular transaction; though such a distinction as this is rather one of degree than of kind.<sup>1</sup> There are many cases of *quasi* partnership, as we shall presently see, where, though no partnership may be properly said to have been created, yet persons are considered to have held themselves out to the world as partners and are made liable in consequence. There is such a thing, too, theoretically speaking, as a universal partnership, where persons own everything in common without the reservation of any private and exclusive rights of ownership to either; and a case in point is that of a sort of religious society called the "Separatists," composed of persons who emigrated some years since from Germany and settled in Ohio.<sup>2</sup> The civil law distinguished between universal partnerships which applied to all property existing or to be subsequently acquired, and those applying to all future acquisitions only, and made provision accordingly.<sup>3</sup> But for ordinary purposes we shall find such distinctions between universal, general, and special partnerships of little consequence.

stitutes a partnership. *Aultman v. Fuller*, 53 Iowa, 60. But a mere joint ownership in property does not constitute a partnership. *Quackenbush v. Sawyer*, 54 Cal. 439. Nor an ownership in common. 161 Penn. St. 53. A joint undertaking and community in profit and loss in the results of the business constitute a partnership, although each partner should retain the exclusive ownership of the separate property by him contributed to the partnership use. *McCrary v. Slaughter*, 58 Ala. 230. See also *Hankey v. Becht*, 25 Minn. 212; c. 8, *supra*. A division of the product among co-tenants raises no presumption of a partnership, which

is rather for buying and selling. *Taylor v. Fried*, 161 Penn. St. 53. As to land purchase, see 142 U. S. 682.

<sup>1</sup> 3 Kent Com. 30; *Ripley v. Colby*, 3 Fost. 438; *Cowp.* 814. See *Willes v. Green*, 5 Hill, 232; *Pars. Partn.* § 40. That there may be a partnership as to some adventure, see 14 Bush, 652; 40 Mich. 651.

<sup>2</sup> *Goesele v. Bimeler*, 14 How. 589. But perhaps this should be styled rather a joint or common ownership. See also 33 La. Ann. 1233.

<sup>3</sup> Note to 3 Kent Com. 30. The "universal partnership," so-called, has been applied to husband and wife under Spanish-American law. 26 Cal. 546.

It would seem that, in order to constitute a partnership, there must be a community of interest for business purposes, under which we mean to include skilled labor, and not the pursuit of trade alone, nor the mere beneficial enjoyment of a capital fund. Clubs for social and charitable purposes do not in general constitute the members partners, though failing of such organization as to be properly considered corporations.<sup>1</sup>

§ 173. **The Same Subject; Essentials of a Partnership as to the Parties; Community of Profits, etc.** — A community of profits is essential to every partnership, though there may be a participation in profits without a partnership at all. As a general rule, there is a community of losses as well as profits; for while a common benefit is the object in view, losses are necessarily incurred in many instances, whether the partnership transactions be viewed as a whole or upon periodical computation; and yet the weight of authority is in favor of regarding a partnership legal and valid, although one or more of the partners should be guaranteed against loss.<sup>2</sup> We here speak of partners as between themselves. But almost invariably the law of partnership in its broadest relations requires a community of interest in the net profits resulting from the business or work done; and this community as to net profits has been taken as perhaps the best test for determining whether or not a partnership has been created, especially where there is to be a corresponding share in the losses. Thus, in *Hoare v. Dawes*, where several persons had employed a broker to purchase a quantity of tea, of which each was to have a separate share, it was decided that they were not partners, because there was no community of profit

<sup>1</sup> See Pars. Partn. § 37, and notes; Story Partn. § 18; 2 M. & W. 172; 3 Ves. & B. 180; 6 Mo. App. 465. So as to members of a masonic lodge. *Ash v. Guie*, 97 Penn. St. 493. Transactions by an inchoate or imperfect corporation are not readily to be construed into constituting *inter se* a partnership. *Ward v. Brigham*, 127 Mass. 24. See also, as to "granges," 9 Neb.

130. And see *Marselles Co. v. Aldrich*, 86 Ill. 504; *First Nat. Bank v. Almy*, 117 Mass. 476; 7 Cush. 188; 11 Barb. 587. *Contra*, 29 Mich. 370; 27 Ind. 399. Nor co-owners, &c. See preceding chapter.

<sup>2</sup> Pars. Partn. § 59, and notes; Story Partn. §§ 18, 23, 27, 32; Smith Com. Law, 1st Am. ed. 195.

and loss in sales between them, but merely an undertaking for a particular quantity.<sup>1</sup> But where in a continuous business of selling one is to share in net profits and losses he is readily found a partner.<sup>2</sup>

As between themselves, physicians or lawyers would be partners if their earnings came into a common stock or fund, and were not until then divided and held in severalty; but if each charges and may demand from others what he earns himself, they are not partners *inter se*.<sup>3</sup>

An equality of profit is not necessary to constitute a partnership. Nor need the contributions be of the same kind; for one partner may contribute all the capital or all the labor, as in the instances just noticed. And if a person should go into a speculation with a broker, he furnishing all the funds, while the broker only rendered services, and the mutual intent being that they shall divide the proceeds, a partnership might exist both as to the property purchased

<sup>1</sup> Hoare v. Dawes, 1 Doug. 371. But where one who owned a lime-kiln agreed that another should furnish material and do the work, and the lime was to be equally divided between them, it was held that a technical partnership had been created. Musier v. Trumpbour, 5 Wend. 274. And see Pars. Partn. 44, and notes; Story Partn. §§ 18, 23, 27, 32. It is said that to be a partner one must share profits as such, with a proprietary interest in them before a division. *Ib.* § 49; 3 Den. 89; 6 Met. 82; 12 Conn. 69.

<sup>2</sup> See Paul v. Cullum, 132 U. S. 539.

<sup>3</sup> Bond v. Pittard, 3 M. & W. 357; Darracott v. Pennington, 34 Ga. 388. That a joint undertaking and community of net profit and loss usually constitute a partnership *inter se*, see 58 Ala. 230; Pawsey v. Armstrong, 18 Ch. D. 698. A.'s contract with C. to share A.'s profits and losses does not constitute C. a partner. Burnett v. Snyder, 81 N. Y.

550. It is fair to presume that losses are intended to be borne between partners in the same proportion that profits are to be enjoyed. 16 Ch. D. 83. But for a peculiar case of liability for losses, though not participating in profits, see *Mandeville v. Mandeville*, 35 Ga. 243; 65 Ga. 666. But where there is no community, so that one might gain and the other lose, there is no partnership. *Flint v. Eureka Marble Co.*, 53 Vt. 689. And see *Beecher v. Buah*, 45 Mich. 188; *Eager v. Crawford*, 76 N. Y. 97; *Hankey v. Becht*, 25 Minn. 212.

As between himself and members of a firm, the sharing of profits of a business in payment for services does not constitute an agent or servant a partner. *Holbrook v. Oberne*, 56 Iowa, 324; 5 Col. 564; *Nicholaus v. Thielges*, 50 Wis. 491; *Smith v. Bodine*, 74 N. Y. 30; 61 Ind. 432. But as to the presumption in such cases, see *Nichoff v. Dudley*, 40 Ill. 406. See also *Moore v. Davis*, L. R. 11 Ch. D. 261.

and the profits.<sup>1</sup> On the whole, we may repeat that while the test of community of net profits is still well approved for determining who are partners, there may be such sharing of profits while yet the relation formed was not a partnership at all.<sup>2</sup>

§ 174. *Conclusion as to Nature and Creation of Partnership.* — It is not easy, then, to determine the true limits of a legal partnership. Persons frequently become partners without being aware of it; they make a bargain together in some special business transaction, involving a venture for profit, but having no other mutual dealings together; or one employs another, and the compensation paid being in the first place contingent upon the business profits, the contract for hire slides gradually into a partnership agreement.<sup>3</sup> The same person may be a partner in several distinct firms, for general business, to say nothing of the special transactions in which he may be engaged with others.<sup>4</sup> And it is upon the winding-up of the business which they have thus legally combined to transact, whether because of bankruptcy or the fulfilment of their purposes, that the parties often find them-

<sup>1</sup> See *Pars. Partn.* 49-51, and cases cited; *Story Partn.* §§ 30, 52. *Paul v. Cullum*, 132 U. S. 539.

The important case of *Cox v. Hickman*, 8 H. L. C. 268 (1860) has been considered as rendering the test approved in earlier authorities obsolete. See *Pars. Partn.* § 43, 4th edition. The decision was simply to the effect that creditors of an insolvent debtor who agree to carry on his business and to apply the net profits to the payment of the debts are not to be considered partners even as to third parties. The case here was a sort of complicated agency on the insolvent debtor's behalf, such as his assignees might have undertaken; the facts were peculiar, and such as most likely must have affected the third parties with actual notice. See further *Bullen v. Sharp*, L. R. 1 C. P. 86; L. R. 4 P. C. 419. A manager for

the mere security of a creditor is no partner. 122 U. S. 138.

<sup>2</sup> Such seems to be the true result of *Cox v. Hickman*, 8 H. L. Cas. 268, whose reasoning ought not to be extended beyond the peculiar facts in question. Corporations share profits; so may joint and common tenants, all agreeably to their several relations. See *Walker v. Hirsch*, 27 Ch. D. 460.

<sup>3</sup> Where two jointly undertook to procure a cargo for a vessel, the commissions to be divided between them, they were pronounced to be to that extent partners. *Bovill v. Hammond*, 6 B. & C. 149. And the same principle has been applied to proprietors of distinct stage lines, so far as concerned a stable and an hostler hired and kept by them together. *Ripley v. Colby*, 3 Fost. 438.

<sup>4</sup> *Swan v. Steele*, 7 East, 210; *Rus-*

selves involved in doubt as to whether they were or were not partners. Even though it be concluded that their mutual intention consisted actually with a partnership, both had not clearly that relation in view, nor is it material in point of fact, to prove such an intention.

§ 175. **Creation of Partnership as to the Public; Partnership Liability, how incurred.** — But if the liabilities of a partnership relation are frequently assumed unconsciously as between the parties themselves to some business transactions for a common benefit, still more frequently is this the case with the partnership liability as toward the public. Persons may be partners or *quasi* partners, as to the world, by construction of law for its own convenience, though not partners *inter se*. For, as the writers on partnership inform us, partnership liability rests upon either or both of two distinct grounds: one, that the person is actually a partner and shown to be such; the other (which is quite sufficient for a third person dealing with the combination), that he has of his own knowledge and consent been held out as a partner to the public generally or to the person having a claim.<sup>1</sup> Let us, then, examine this rule of partnership liability as to third persons more closely, and thus complete our investigation into the nature, creation, and extent of a legal partnership; for it is here that the principles of partnership are more completely developed, though the decisions are found conflicting as well as cumbersome.

§ 176. **Partnership as to the Public; Ostensible, Nominal, Silent, Secret, etc., Partners.** — Now we find different classes of partners mentioned in the books. There is the *ostensible* or *public* partner; that is, the person who is shown forth to the world as a partner, and who thus incurs the ordinary liabilities of partnership.<sup>2</sup> This ostensible or public partner

sell v. Leland, 12 Allen, 349; Pars. Partn. 52-54.

<sup>1</sup> Pars. Partn. 9, 61, and cases cited; Hodgson v. Temple, 5 Taunt. 181; 3 Kent Com. 27, 31; Story Partn. § 63 *et seq.* Some writers appear dissatisfied with any such

distinction, and assert that there can be no partnership except one founded upon the intention of the parties. The weight of judicial authority is against this assumption. See Pars. § 48, 4th edition, with citations.

<sup>2</sup> Goddard v. Pratt, 16 Pick. 428;

may be an actual partner by being likewise a partner as concerns the parties to the combination ; or he may be a merely nominal partner. A *nominal* partner is understood to be, in strictness, one who by his acts and conduct suffers himself to incur a partnership liability to the public, by lending his name or credit to the concern, though he is not an actual partner as regards the parties to the combination.<sup>1</sup> Then again, there is the *silent, secret, or dormant* partner ; who, to speak concisely, is a person participating in the net profits of the business while concealing his name ; though there is a possible shade of difference in the significance of these several epithets which we need not trace. Such a partner, when found out, is legally liable to third parties, not because he was held out as a partner, but, regarding the parties to the combination *inter se* and with an application of results such as we find in the general law of agency, because he was a partner and a principal.<sup>2</sup>

Here, then, the two grounds of partnership liability to the public are plainly indicated : the one, that of actual partnership, however secret ; the other, that of ostensible partnership, whether actual or not.<sup>3</sup> In the latter class of cases (which also harmonizes with the law of agency), or certainly in many instances which are to be found under that head, it would be seen to be more exact to say that a *quasi* partnership existed, than that there was a legal partnership. But we must defer in this respect to the language of the courts and the text-writers.

§ 177. **Secret Partnership; Liability of Actual Partner to the Public.**—Now, let us elaborate these doctrines somewhat at

Pars. Partn. § 27 ; 3 Kent Com. 81.

<sup>1</sup> 3 Kent Com. 81, 82 ; Smith Com. Law, 199 ; Story Partn. § 64 ; Martin v. Gray, 14 C. B. x. s. 824 ; Pars. Partn. §§ 26-36 ; Waugh v. Carver, 2 H. Bl. 235.

<sup>2</sup> Pars. Partn. §§ 30, 31, and cases cited ; Story Partn. § 63 ; 3 Kent Com. 81. And see Baldwin, J., in Winship v. Bank of the United States, 5

Pet. 573 ; Gilmore v. Merritt, 62 Ind. 525.

<sup>3</sup> There can be no such thing as a partnership as to third persons, when as between the parties themselves there is none, and the third persons have not been misled by concealment of facts or by deceptive appearances. Beecher v. Bush, 45 Mich. 188. This doctrine seems to consist with the facts in Cox v. Hickman, 8 H. L. Cas. 268.

length. The cases which establish the proposition that one incurs a partnership liability to third persons if an actual partner, however carefully his name may have been concealed and kept secret, are not always to be easily reconciled. Chancellor Kent lays down the rule as substantially that each individual member of a partnership is answerable *in solido* to the whole amount of debts without reference to the proportion of his interest, or to the nature of the stipulation between him and his associates; that even if it were the intention of the parties that they should not be partners, and the person to be charged was not to contribute either money or labor, or to receive any part of the profits, yet if he lends his name as a partner, or suffers his name to continue in the firm after he has ceased to be an actual partner, he is responsible to third persons as a partner, for he may induce third persons to give that credit to the firm which otherwise it would not receive nor perhaps deserve.<sup>1</sup> Such a principle of law as this, the reader will perceive, inculcates honest, open, and fair dealing, and regards not so much the question, what was the mutual understanding of the parties when the debt was contracted, as what from their mutual situation had the creditor a just right to know and to rely upon for securing payment. It is therefore admitted, in the jurisprudence of this country as well as in England, that secret or dormant partners, when discovered, are equally liable upon the partnership engagements as if their names had never been concealed, although they were unknown by the creditor to be partners at the time of the creation of the debt. And the weight of authority is in favor of carrying the secret partner's liability to the full extent of the acting partner's contracts made within the usual scope of the partnership business, whether such contracts are really on the partnership account or not.<sup>2</sup> The fact that one has been able to

<sup>1</sup> 3 Kent Com. 31-33, and cases cited.

<sup>2</sup> *Ib.*; Pars. Partn. §§ 80, 81, and citations in notes; *Lloyd v. Ashby*, 2 B. & Ald. 23; *Ross v. Decy*, 2 Esp. 469; *Chamberlain v. Madden*, 7 Rich.

395; *Gilmore v. Merritt*, 62 Ind. 525; *Robertson v. Smith*, 18 Johns. 459; *Martin v. Gray*, 14 C. B. n. s. 824. But see *Etheridge v. Binney*, 9 Pick. 272; *Sheehy v. Mandeville*, 6 Cr. 253.



hide his partnership connection from the world furnishes no sufficient reason why he should not share in the liabilities as he does in the benefits of the concern.<sup>1</sup>

Yet it must be manifest that this principle, when carried out without qualification, often works injustice to the debtor for the creditor's undue advancement. We have seen that parties are often betrayed into some kind of a partnership combination without being fully aware of it at the start, nor intending at any time that responsibilities so vast should come upon their own shoulders. Such must be the case even with secret or dormant partners, in many instances; their primary intention being, perhaps, to help on some speculation or to aid a friend with their capital, or to lend a certain sum of money upon what promised a fair recompense; and their motives for secrecy being entirely honorable, so far at least as might concern the parties with whom the ostensible partner was dealing. Shall the dormant partner, thus meaning to act in good faith, incur liabilities for his associate's mismanagement or dishonesty, so far out of proportion to his own actual interest in the venture, and that, too, as to creditors who had relied solely upon the other's ability to pay? The Roman law, as Mr. Justice Story tells us, did not create a partnership between the parties as to third persons without their consent, or against the stipulations of their own contract.<sup>2</sup> And he is of opinion that the common law has pressed its principles on this subject beyond the requirements of natural justice.<sup>3</sup> But a later text-writer, who does not share in this opinion, reviews the earlier and later cases, and finds that the common law still maintains much of its old ground; though he admits the extreme difficulty of reconciling all the cases and extracting from them a precise principle.<sup>4</sup> As the tendency of this age is in favor

<sup>1</sup> Marshall, C. J., in *Winship v. Bank of the United States*, 5 Pet. 561. And see *Hoare v. Dawes*, 2 Doug. 371; *Saville v. Robertson*, 4 T. R. 725. Where a business is carried on ostensibly by one alone upon the capital put in by another, the

secret partner is liable, though his money was misused. *Gavin v. Walker*, 14 Lea, 648.

<sup>2</sup> Dig. 17, 2, 44; Story Partn. §§ 86, 87.

<sup>3</sup> *Ib.*

<sup>4</sup> *Partn. Partn.* 71, and cases cited.

of limitations upon those vast and ill-defined responsibilities which the old law of partnership threw upon persons seeking to invest capital in a business and not to share in its active management, — as we shall see hereafter when examining the growth of limited partnerships and corporations in the United States and England, — so we think the tendency is, and will be, to relax somewhat the liability of secret and dormant partners who had not stealthily sought unreasonable advantages, but were betrayed unwittingly into a business combination. And this tendency seems to have manifested itself in the judicial confusion which prevails over the criteria of a partnership as respects third persons; for we find some very fine, and not always satisfactory, distinctions set forth in that connection.

§ 178. *The Same Subject.* — Thus community of profit is usually taken to be the true criterion for determining whether any combination for carrying on a business constitutes a partnership as to third persons. But a liability founded upon a true common interest in the profits must be somewhat vague after all; for general creditors have an interest in the profits; and so might one advancing money to a firm for its business, or a clerk in its employ.<sup>1</sup> Publisher and author may agree to divide the profits of a proposed work which the former is to publish at his own expense; but publisher and author are not thereby made partners.<sup>2</sup> If one receives, by way of compensation for his services, a stated portion of the profits, as a measure of the amount of his salary, in whole or in part, or the mode of its payment, he will not, on that account, be liable as a partner.<sup>3</sup> In all agreements with sailors who receive for wages a share in the profits of the voyage, the English and American rule is that they are not thereby made partners either as to rights

Prof. Parsons thinks this subject one of the most interesting, and perhaps one of the most difficult, in the whole law of partnership. *Par. Partn.* 71, 8d ed.

<sup>1</sup> *Bigelow v. Elliot*, 1 *Cliff.* 28; *Par. Partn.* 71 *et seq.*, and notes.

<sup>2</sup> *Wilson v. Whitehead*, 10 *M. & W.* 503.

<sup>3</sup> *Brightly Fed. Dig. Suppl.* 189; *Vanderburgh v. Hull*, 20 *Wend.* 70; 8 *Kent Com.* 33, 34, and notes; *Par. Partn.* 145; *supra*, § 173, *n.*

or liabilities.<sup>1</sup> An agreement to give one who lends money part of the business profits of a concern by way of bonus, in addition to interest, does not make such creditor a partner.<sup>2</sup> And there are other instances where persons who join in an enterprise or transaction are not treated as partners, though interested in the net profits.<sup>3</sup> Sometimes the principle is asserted that they only are partners who are jointly interested in the profits as profits, and not by way of payment for labor or work performed. Mr. Justice Story deduces as a principle from all the authorities that a participation in profits raises a presumption of partnership, which, however, is not conclusive, but may be overcome by other circumstances.<sup>4</sup> The rule of *Waugh v. Carver*, which is also approved by Chancellor Kent, is that an indefinite participation in profits makes one a partner as to third persons, because by such participation the fund on which the creditors rely is diminished.<sup>5</sup> Again, it has been asserted by eminent jurists, that one is liable as partner to third parties when his interest in the profits is such as gives him the right to an account; but this test is clearly unsatisfactory, and a mere begging of the question.<sup>6</sup> Again, the distinction is sometimes made between sharers in gross receipts and sharers in net profits; but this, as a conclusive test, seems inexact.<sup>7</sup>

A late writer of eminence comes, perhaps, most nearly to the mark, when he draws a distinction between accruing or unascertained profits, and profits which have been ascertained and divided; and he lays it down that persons not held out to the public as partners incur the partnership liability, both as to third persons and *inter se*, only when they have some

<sup>1</sup> *Rice v. Austin*, 17 Mass. 197; see *Cox v. Hickman*, cited § 173, Pars. Partn. 76, *passim*. notes.

<sup>2</sup> 130 U. S. 472; *Meehan v. Valentine*, 145 U. S. 611. Cf. 166 Penn. St. 490.

<sup>3</sup> *Parker v. Fergus*, 43 Ill. 438; *Waugh v. Carver*, 2 H. Bl. 235; *Hesketh v. Blanchard*, 4 East, 144; *Loomis v. Marshall*, 12 Conn. 69; *Denny v. Cabot*, 6 Met. 82; *Berthold v. Goldsmith*, 24 How. 536. And

<sup>4</sup> Story Partn. § 38 *et seq.*

<sup>5</sup> *Waugh v. Carver*, 2 H. Bl. 235; 3 Kent Com. 27, and cases cited.

<sup>6</sup> 3 Kent Com. 26, note; *Ex parte Hamper*, 17 Ves. 412; *Champion v. Bostwick*, 18 Wend. 184; Pars. Partn. 92; *Bisset Partn.* 14.

<sup>7</sup> See Pars. Partn. § 50, and notes; *Dry v. Boswell*, 1 Campb. 329; *Parker v. Canfield*, 37 Conn. 250.

ownership in or of the profits as they accrue and are not ascertained or divided into portions. This community in unascertained and undivided profits he deems to be the true test of a partnership.<sup>1</sup> But in practice this test likewise will be found a difficult one to apply. On the whole, it must be admitted that there is a great mass of decisions which are irreconcilable on any one of these principles. Even participation in the profits may not be decisive proof of a partnership where other facts contradict this assumption.<sup>2</sup> And as to a secret or dormant partner, secrecy on his part and want of knowledge on the part of the creditor have been deemed essential elements of the liability.<sup>3</sup> The intention of the partnership is to be considered in all cases; though we should admit that if parties secretly make an agreement whose plain effect is to bring them into the partnership relation, they will be deemed partners as to third persons, and generally as to external liabilities, even though such were not their intention in making the agreement.<sup>4</sup> And, on the other hand, while participation in accruing profits is a most convenient test of the partnership relation, it establishes no such liability where the legal effect of the arrangement entered into was not to create a partnership.

**§ 179. Ostensible Partnership ; Nominal Partner's Liability.**

— But partnership liability is, as we have said, also incurred in cases of ostensible partnership, whether actual or not. Here we come from the secret or dormant partner to his counterpart, the nominal partner. The general principle is, that if one holds himself out to the world as partner in a firm, he is liable as such, though he have no interest in it. But this principle is qualified by another; namely, that a creditor who had no reason to believe that the person so

<sup>1</sup> Pars. Partn. § 50; *Dry v. Boswell*, 1 Campb. 329; *Turner v. Bissell*, 14 Pick. 192; *Ambler v. Bradley*, 6 Vt. 119.

<sup>2</sup> *Bullen v. Sharp*, L. R. 1 C. P. 86; *Cox v. Hickman*, 8 H. L. Cas. 268.

<sup>3</sup> *Bigelow v. Elliot*, 1 Cliff. 28. And see *Palmer v. Elliot*, 1 Cliff. 68.

<sup>4</sup> See *Bigelow v. Elliot*, 1 Cliff. 28; Pars. Partn. 71, and cases cited in notes at length; *Hargrave v. Conroy*, 4 Green, 281; *Loomis v. Marshall*, 12 Conn. 69; *Denny v. Cabot*, 6 Met. 82; *Hickman v. Cox*, 3 C. B. n. s. 528.

held out was a partner cannot recover.<sup>1</sup> The decisions are somewhat conflicting as to a nominal partner's liability; some holding that one put forth to the world as a partner is for that cause and on considerations of public policy liable to the creditors of the firm; others again, with better reason, that one is liable only because he was a partner in fact and interest, or at least because the creditor may justly have regarded him as such, and dealt with the firm from regard to the identity of interest, or the additional credit which such a name furnished. It would seem to come back properly to a question of actual circumstances: the true rule being, perhaps, that a nominal partner, who by his authority, consent, or connivance was held out to the public as a partner, must suffer the general consequences to every creditor or customer; while if nothing more than negligence can be imputed against him in such a connection, only the creditor who was actually misled by the improper use of his name as a partner should hold him liable.<sup>2</sup> In the case of the nominal as well as the secret partner, we seem to trace a disposition of the courts to screen from the harshest legal consequences those who were found to have strayed carelessly, but unintentionally, into partnership combinations, especially as to third persons who were not actually misled in consequence.

In general, conversations, admissions, assertions, or acts tending to show a partnership interest, though they might be quite insufficient to establish an actual partnership between the parties, would often be conclusive of liability so far as concerned third persons. One cannot safely allow outside parties to believe him a partner and let them rely on his credit, if he would avoid a partnership liability; though an unsupported conjecture of the public is insufficient.<sup>3</sup> Long and public manifestation is held to justify the inference of

<sup>1</sup> 3 Kent Com. 32, and notes; Story Partn. § 64; Wood v. Pennell, 15 Me. 52.

<sup>2</sup> Spencer v. Billing, 3 Campb. 310; Swan v. Steele, 7 East, 210; Pars. Partn. § 82, and cases cited; Wood v. Pennell, 51 Me. 42; Fitch v. Har-

rington, 13 Gray, 468. Two firms will be held to be one if they assume to constitute one. Beall v. Lowndes, 4 S. C. 258.

<sup>3</sup> Pars. Partn. § 82; Goode v. Harrison, 5 B. & Ald. 147; Dutton v. Woodman, 9 Cush. 255.

one's general liability, so as to dispense with direct testimony that the party dealing with the firm relied upon it.<sup>1</sup>

Here it may be remarked that the partnership name and style has much to do with the question of a nominal partner's responsibilities; not that a partnership may not exist without any firm name, but because a firm name is usual and eminently proper. Though the agreement of partnership adopts no firm name, yet if the business be transacted in a particular style, as H. & J., this becomes the legitimate name of the firm.<sup>2</sup> Sometimes a single individual doing business uses the words "and Co.," by way of amplifying his sole credit with the public; but this practice, though often harmless, is improper; and in New York and some other States we find legislation which makes the transaction of business in the name of a fictitious firm a penal offence or imposes special requirements, as a condition of doing such business.<sup>3</sup> Even where a partnership name and style are agreed upon and have been used, this will not prevent persons from being bound by their dealings under some other partnership name which they habitually use besides.<sup>4</sup> But the use of such a name as usually indicates partnership, while it may be *prima facie* evidence of partnership, affords but slight proof that it legally existed.<sup>5</sup> Our latest tendency in many States is to allow any name to be adopted as the firm name, even though in a form suggestive of a corporation.<sup>6</sup>

§ 180. **The Same Subject.**—The question of a nominal partner's liability may be usually referred to his acts and

<sup>1</sup> *Sun Ins. Co. v. Kountz*, 122 U. S. 583.

<sup>2</sup> *Le Roy v. Johnson*, 2 Pet. 186; *Ripley v. Colby*, 3 Fost. 443; *Para. Partn.* § 176.

<sup>3</sup> See 3 Kent Com. 31, and notes; 8 Abb. N. C. 76; 70 Cal. 194. This New York penal statute is laxly interpreted by the courts. 97 N. Y. 472, 476; 88 N. Y. 74.

<sup>4</sup> See 3 Kent Com. 31, 32; *Williamson v. Johnson*, 1 B. & C. 146; *Rogers v. Coit*, 6 Hill, 322; *Mifflin*

*v. Smith*, 17 S. & R. 165; *Beall v. Lowndes*, 4 S. C. 258.

<sup>5</sup> *Charman v. Henshaw*, 15 Gray, 293. *Vice versa*, if the name of the firm be merely that of an individual partner, it is not presumed that, where the individual signed his name to a bill, he did so on behalf of the firm. *Yorkshire Banking Co. v. Beatson*, 4 C. P. D. 204; *United States Bank v. Binney*, 5 Mason, 176; 16 Barb. 608.

<sup>6</sup> *Holbrook v. Ins. Co.*, 25 Minn. 229; *Para. Partn.* § 97.

conduct. As was observed in *Fox v. Clifton*, the holding one's self out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party.<sup>1</sup> It is the lending of one's name to the concern, not the improper use of that name by others, which the court usually regards. Declarations of the actual partners carry no great weight of themselves when unsupported by circumstances evincing the nominal partner's concurrence; but if the latter knows that his name is used on the sign-board, in the advertisements and business circulars of the firm, or otherwise, he may become liable to customers, unless he seasonably repudiates and disavows all connection with the firm.<sup>2</sup> The knowledge that his name is so used, and his consent thereto, is the ground upon which he is estopped from disputing his liability as a partner.

§ 181. **Modern Legislation affecting Partnership Liability to the Public.**—The general uncertainty which thus prevails concerning partnership liability in its legal sense has led, in England, to the passage of an explanatory act,<sup>3</sup> which is substantially to this effect: that neither the advance of money on contract to receive a share of profits, nor the remuneration of servants and agents by a share of profits, nor the receipt of profits by certain annuitants (such as the widow and child of deceased partners), nor the acceptance of profits in consideration of the sale of good-will, shall constitute the party so benefited a partner. But English courts of high authority have since observed that the common law is to the same effect, and that nothing has been really gained by this legislation.<sup>4</sup>

§ 182. **Liability of Partners to Third Parties affected by Notice of Stipulations, etc.**—But the liability of partners to third parties may sometimes be affected by stipulations between themselves of which such third persons had knowledge.

<sup>1</sup> 6 Bing. 776. See *Bourne v. Freeth*, 9 B. & C. 632; *Partn. Partn.* §§ 84–97; *Smith's Man. Com. Law*, 197. This is known as "Bovill's Act."

<sup>2</sup> *Dolman v. Prichard*, 2 C. & P. 104; *Gill v. Kuhn*, 6 S. & R. 338; *Tuttle v. Cooper*, 5 Pick. 414.

<sup>3</sup> 28 & 29 Vict. c. 86, July 5, 1865.

<sup>4</sup> See *per curiam*, L. R. 4 P. C. 419; 5 Ch. D. 458.

And while private or secret stipulations cannot control the liability of members composing a firm as concerns those without proper notice who dealt with them, there are, nevertheless, cases which tend to make reasonable stipulations between partners qualifying their partnership liability, operative and obligatory upon third parties to whom those stipulations were made known.<sup>1</sup> This doctrine is quite analogous to that of credit given to one partner only; namely, that if a creditor sells goods or loans money on the sole credit of one of the partners, or otherwise deals with him as an individual, and not as a member of the firm, the other partners are exonerated from liability; though the presumption would be that business within the usual scope of a partnership is transacted with a partner as such, and not in his private capacity, and *vice versa*.<sup>2</sup> Further, as we shall presently see, knowledge by one who deals with one partner that such partner acts outside the scope of his partnership authority, or is defrauding his associates, may invalidate the transaction as concerns the firm itself.

§ 183. **Articles of Copartnership.**— We have seen that a partnership is frequently to be inferred from the acts and conduct of the parties combining for business purposes. But parties usually execute some distinctive agreement when they mean to establish a firm for regular partnership transactions with the public; and a formal contract of this kind, reduced to writing and signed by all concerned, is familiarly known as “articles of copartnership.” Articles of copartnership usually designate the partnership name, and may embrace a great variety of stipulations, like other contracts; and we frequently find in them restrictions imposed by way of mutual protection, as, for instance, in signing negotiable paper; and sometimes provisions for the expulsion of members in certain cases, or for the reference of differences which may arise to arbitration, or

<sup>1</sup> See Pars. Partn. § 84 and notes; *Parker v. Canfield*, 37 Conn. 250; *Knox v. Buffington*, 50 Iowa, 320; *Kimbro v. Bullitt*, 22 How. 256; *Croughton v. Forrest*, 17 Mo. 131; 5 Pet. 529; 3 Kent Com. 44, 45. <sup>2</sup> *Barton v. Hanson*, 2 Campb. 97; *Le Roy v. Johnson*, 2 Pet. 186; *Lafou v. Chinn*, 6 B. Mon. 305; *Ex parte Hunter*, 1 Atk. 223; Pars. Partn. 104–115.



for liquidated damages where a member of the firm is guilty of misconduct.<sup>1</sup> These articles usually come for consideration before courts of equity, whose province it is to adjust the mutual accounts of partners and compose their strifes; and their provisions are regarded with much favor, and upheld even to the silent renewal of a partnership at the close of the stipulated period for its continuance; the presumption being that a partnership is renewed on the same terms as before, unless something can be shown to the contrary.<sup>2</sup> Partners may make new terms or new arrangements at any time on mutual concurrence; and the substantial rights of each partner, though not expressly defined, are to be sedulously regarded.<sup>3</sup> As already intimated, the provisions in such articles bind only parties to the instrument and third parties having notice; and their interpretation should be in connection with the general law of partnership.<sup>4</sup>

§ 184. **Time when a Partnership begins.**—The time when a partnership begins is usually to be determined by the terms of the contract or mutual agreement; and if no date is established by written articles, the date of their execution will be presumed. Where the law infers a partnership from the conduct of parties over certain joint transactions, and there is no express agreement to this effect, written or oral, between them, the date of the transaction or of the agreement to enter into the transaction will be taken, as circumstances may justify.<sup>5</sup>

<sup>1</sup> Story Partn. §§ 187-215; Pars. Partn. §§ 159-174, and notes; *Gred-dies v. Wallace*, 2 Bligh, 295; *Wood v. Scoles*, L. R. 1 Ch. 369; *Livingston v. Ralli*, 5 E. & B. 132; *Patterson v. Silliman*, 28 Penn. St. 304; L. R. 19 Eq. 599.

<sup>2</sup> *Crawshay v. Collins*, 15 Ves. 218; *Bradley v. Chamberlin*, 16 Vt. 613. In various ways, equity upholds rights under such contracts. But special and unusual provisions will not, by a strict construction, be considered as in force after the term stated has expired. *Clark v. Leach*, 8 L. T. N. S. 40; *Noonan v. McNab*, 30 Wis. 277. See *Harvey v. Varney*, 98 Mass.

118. While equity will, under strong circumstances, decree a specific performance of a copartnership contract, it usually refuses to do so. *Scott v. Rayment*, L. R. 7 Eq. 112. But one partner may be enjoined from engaging in business prejudicial to the firm. *Marshall v. Johnson*, 33 Ga. 500. See also *Hayes v. Fish*, 36 Ohio St. 498. A mere executory agreement does not establish a partnership. *Beckford v. Hill*, 124 Mass. 588; 17 Fed. 726.

<sup>3</sup> *England v. Curling*, 8 Beav. 129; Pars. Partn. § 160.

<sup>4</sup> Pars. Partn. §§ 160, 161.

<sup>5</sup> Pars. Partn. § 12; *Fox v. Clifton*,

§ 185. **Rights and Duties of Partners; Rights in Partnership Property.** — *Secondly.* As to the rights and duties of partners to themselves and to the public.

What most immediately concerns us, in the present connection, is the consideration of their rights in the partnership property. By partnership property is meant whatever belongs to a partnership, whether personal or real; the latter kind of property being, however, treated in a measure as personal under the operation of peculiar rules. The personal property of a partnership chiefly consists in what is known as the goods and merchandise or stock in trade; and this, where the business is that of selling and buying, must be often of great as well as especial value; the horses and carriages of a firm; furniture, books, safes, and all other chattels bought by the partnership with partnership funds and for partnership purposes; outstanding accounts, debts, and claims, whether with or without security, and whether evidenced by writing or not; cash in hand and balances at the bank; also shares in companies or scrip bought or turned into the partnership, and not belonging to the individual partners or placed to their separate accounts.<sup>1</sup> All such partnership property is owned not by the individual partners but by the firm; and the title should stand or be transferred accordingly.<sup>2</sup>

The "good-will" of a prosperous partnership is a valuable interest; but it seems to be recognized as of pecuniary importance only when referred to the place where the partnership business has been carried on; for, as Lord Eldon says, "the good-will of a trade is nothing more than the probability that the old customers will resort to the old place."<sup>3</sup> Good-will

6 Bing. 776; *Murray v. Richards*, 1 Wend. 58; *Aspinwall v. Williams*, 1 Ohio, 38; *Gardiner v. Childs*, 8 Car. & P. 345. This might not be until the property with which they were to do business was obtained. 79 Ala. 452; 14 Col. 335. But where joint action is to begin at once, the partnership begins at once. 55 Mich. 167; 91 U. S. 134; 150 U. S. 524.

<sup>1</sup> See *Pars. Partn.* §§ 177-183; *Story Partn.* § 98.

<sup>2</sup> *Pars. Partn.* § 178. But while a partner has no interest in specific property of the firm, but only an undivided and distributive interest, he may sell, mortgage, or pledge this interest. *Ib.*, and cases cited; 107 Penn. St. 590; 82 Cal. 474; 11 Wall. 624. See § 189.

<sup>3</sup> *Cruttwell v. Lye*, 17 Ves. 385, 346; *Pars. Partn.* § 181; *Story Partn.* §§ 99, 211; *Shackle v. Baker*, 14 Ves. 468. See *Warfield v. Booth*, 32 Md. 63.

is the benefit which results from good reputation and connections where the business has been built up. Courts are sometimes disposed to disregard the claim of a deceased partner's personal representatives in the good-will of a business as against surviving partners; but where the interest is really valuable, as it often must be, the better opinion is that equity will order it sold with the other effects for the common benefit.<sup>1</sup> The good-will of professional partnerships is rarely important in such a sense, since those dealing with lawyers, physicians, and artists, regard personal qualifications as of far greater consequence than the place where they do business.<sup>2</sup> Good-will is firm property, and a sale of all interest in a business or its assets transfers it as an incident.<sup>3</sup>

The rights of partners to the partnership property are much like those of joint owners: that is, they are jointly interested therein; but they have not *inter se* that right of survivorship which is the peculiar characteristic of joint tenancy.<sup>4</sup> In the absence of evidence to the contrary, partners are deemed to be equally interested in the partnership stock and effects and the profits; yet the members may agree to own in any proportions; skill may be contributed by one, and capital in money by another; and partnership combinations are constantly formed among persons whose interests are manifestly made unequal.<sup>5</sup> So long, indeed, as the com-

<sup>1</sup> *Ib.*; *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68; 3 Kent Com. 64; *Crawshaw v. Collins*, 15 Ves. 224. See *Sheldon v. Houghton*, 5 Bl. C. C. 285.

<sup>2</sup> *Hoyt v. Holley*, 39 Conn. 326; *Farr v. Pearce*, 3 Madd. 78. The trade name or trade mark appears often a valuable interest in connection with the "good-will," and on various considerations it cannot be used by one carrying on the business, regardless of the interests of a retiring or deceased partner. *McGowan v. McGowan*, 22 Ohio St. 370; *Hookham v. Pottage*, L. R. 8 Ch. 91; *Para. Partn.* § 182. See *Levy v. Walker*, 10 Ch. D. 436. Under certain circumstances "good-will" is not a

partnership asset susceptible of valuation. *Steuart v. Gladstone*, 10 Ch. D. 626. See also 45 L. T. 303; *Leggott v. Barrett*, 15 Ch. D. 306.

<sup>3</sup> *Hoxie v. Chaney*, 143 Mass. 592; *Merry v. Hooper*, 111 N. Y. 415; *Cruess v. Fessler*, 39 Cal. 336; *Wallingford v. Burr*, 17 Neb. 137.

<sup>4</sup> *Story Partn.* §§ 88-91; *Para. Partn.* 168, 258, 259; *Lindley Partn.* 573; 3 Kent Com. 36, 37; *Aultman v. Fuller*, 53 Iowa, 60. And see preceding chapter.

<sup>5</sup> *Para. Partn.* 168, 258, 259. See *Story Partn.* § 24, *n.*; *Thompson v. Williamson*, 7 Bligh, n. s. 432; *Farr v. Johnson*, 25 Ill. 522; *Stewart v. Forbes*, 1 Macn. & G. 137, 146.

munity in profit or loss exists as to the enterprise, it is held that each partner may retain by special agreement the exclusive ownership of the things contributed by him to the partnership use,<sup>1</sup> and one may be partner without being partner or part-owner in the property with which the enterprise is carried on.<sup>2</sup> And in equity a partner may even be found indebted to the concern, since partners may buy or borrow from the firm, and the firm from each partner.<sup>3</sup>

Where a partnership is dissolved by the death of some member of the firm, the case is peculiar; for here the representatives of the deceased partner become tenants in common with the survivor; while in the collection of outstanding debts and the general winding up of the partnership business, survivorship so far exists at law that the surviving partners have exclusive possession and management; not, however, for their own exclusive benefit, but as trustees for all concerned, for themselves, for the creditors of the firm, and for the representatives of their late fellow-partner.<sup>4</sup>

§ 186. **The Same Subject; Rights in Real Estate.** — It was formerly deemed that partners could not, as such, own real estate, nor indeed transact business in lands at all. But the law in this respect has changed with the wants of trade. Not only does a partnership find real estate suitable for the purposes of investment, but lands and buildings are frequently desired for stores, warehouses, and factories, in immediate connection with the partnership pursuits; and, besides, real estate mortgaged to secure debts to the firm, or attached, may come into the hands of the partners as such, by foreclosure or sale on execution. The English and American rule, as now established, is that real estate purchased with partnership funds and held as partnership property is to be so viewed in equity; it is subjected to all the partnership incidents, and treated as personalty so far as

<sup>1</sup> *Champion v. Bostwick*, 18 Wend. 183; *McCrary v. Slaughter*, 58 Ala. 230. Cf. *Stumph v. Bauer*, 76 Ind. 157.

<sup>2</sup> *Hankey v. Becht*, 25 Minn. 212; 22 Pick. 151.

<sup>3</sup> *Story Partn.* § 91; *Pars. Partn.* 258, 259.

<sup>4</sup> 3 Kent Com. 37, and cases cited; *Pars. Partn.* 440-442; *Story Partn.* § 177; *post*, as to dissolution. Where a firm transfers all its assets to a cor-

the partnership necessities make this proper.<sup>1</sup> And as to whether real or personal property was so purchased, actual intention must prevail in equity over external appearances.<sup>2</sup>

§ 187. **Right of Partner to bind the Firm as to the Public.** —

As to the acts by which one partner may bind the firm, Chancellor Kent finds that the books abound with numerous and subtle distinctions.<sup>3</sup> It is the extent of one partner's legal authority to make all liable to the public which produces so much mischief; for so close is a partnership combination, that one rogue may in this respect ruin many innocent associates. In general, the act of each partner, in transactions relating to the partnership, is considered the act of all, and binds all. If one makes an admission, acknowledgment, or representation, with respect to the firm business, his partners are generally bound by it. And where notice is given by or to one partner respecting the partnership business, it is equivalent to notice given by or to all. This vast power is not confined to buying or selling, but extends, as concerns the public, to all acts and contracts which

poration, and each partner receives corporate stock in proportion to his share in the concern, the stock is the individual property of each partner; for a new relation is created. *Singer v. Carpenter*, 125 Ill. 117.

<sup>1</sup> See *Bright*, Fed. Dig. 602; 3 Kent Com. 38-40, and *n.*; *Story* Partn. § 93; *Ashton v. Robinson*, L. R. 20 Eq. 25; *Wilcox v. Wilcox*, 13 Allen, 252; *Bowker v. Smith*, 48 N. H. 111; *Pars. Partn.* §§ 263-278, and cases cited; *Fairchild v. Fairchild*, 64 N. Y. 471; *Sherwood v. St. Paul, &c.*, 21 Minn. 127; 145 U. S. 512. This topic does not properly fall within the limits of this treatise; but we may add that *Wilcox v. Wilcox*, *supra*, limits the extent to which partnership real estate ought to be considered as personal property. Prof. Parsons, citing various equity authorities, concludes that the English rule goes beyond the American in giving to real estate, purchased with partnership funds, the es-

sential incidents of personal property. *Pars. Partn.* § 270, and cases cited; *Essex v. Essex*, 20 Beav. 442. But where tenants in common, who owned land, treated it throughout as real estate in carrying on a quarrying business, the land is held to remain realty. *Steward v. Blakeway*, L. R. 4 Ch. 603. Cf. 7 L. R. Ir. 428.

Though the legal title to partnership real estate stands in the name of one, equity will treat the property as partnership personalty so far as may be just. *Shanks v. Klein*, 104 U. S. 18; *Causler v. Wharton*, 62 Ala. 358. If a partner has the firm land in his own name, equity gives the firm the benefit. A partnership, as such, cannot, however, in the firm name, take the legal title to real estate. *Tidd v. Rines*, 26 Minn. 201. See further, *Pars. Partn.* § 265, and latest citations.

<sup>2</sup> See 30 N. J. Eq. 176.

<sup>3</sup> 3 Kent Com. 41.

may fairly be considered within the scope of the partnership business.<sup>1</sup>

And as each partner may contract to this extent, so, too, he has, as to the public, the absolute *jus disponendi*, or right to dispose of any and all of the partnership effects; and he may sell, assign, or transfer any or all of the personal property belonging to the concern (the transfer of its real estate being otherwise restricted by law) in the way of regular business, though in fraud of his partners, so long as knowledge of the fraud is not brought home to the purchaser.<sup>2</sup> If such full transfer be *bonâ fide* on his part, the equities of his copartners are extinguished correspondingly.<sup>3</sup> But all such transactions, in order to be binding, should be done in the regular and ostensible course of business of the firm; and third parties are not absolved from the necessity of prudent inquiry and caution when dealing with an individual who professes to act on behalf of the partnership, especially where the transaction is such as ought of itself to excite suspicion.<sup>4</sup>

§ 188. **The Same Subject; Instances considered.**— Thus, there are numerous instances in which it is held that a partner may bind the firm by borrowing money,<sup>5</sup> even though he should misapply after receiving it; and by lending money.<sup>6</sup> One partner may bind the firm by effecting insurance on the partnership property.<sup>7</sup> And all the members of a trading firm are responsible for bills of exchange or promissory notes drawn and signed or accepted by one of its members in the

<sup>1</sup> Ib. 40-46, and cases cited; Story Partn. §§ 107, 108; Pars. Partn. §§ 114-130.

<sup>2</sup> Bright. Fed. Dig. Partnership, IV.; Lambert's Case, 1 Godb. 244; Marshall, C. J., in *Anderson v. Tompkins*, 1 Brock. 460; Story Partn. § 94; Pars. Partn. § 108; 3 Kent Com. 41; *Locke v. Lewis*, 124 Mass. 1. But as to such transfers outside the scope of business, see § 188, *post*.

<sup>3</sup> *Huiskamp v. Wagon Co.*, 121 U. S. 310.

<sup>4</sup> *Wells v. March*, 30 N. Y. 344;

*Rogers v. Batchelor*, 12 Pet. 221; *Cadwallader v. Kroesen*, 22 Md. 200. See further, § 189, *post*.

<sup>5</sup> *Winship v. Bank of United States*, 5 Pet. 529; *Whitaker v. Brown*, 16 Wend. 505; *Etheridge v. Binney*, 9 Pick. 272; *Rothwell v. Humphreys*, 1 Esp. 406.

<sup>6</sup> *Alexander v. Barker*, 2 Cr. & J. 133.

<sup>7</sup> *Hooper v. Lusby*, 4 Campb. 66; *Foster v. United States Ins. Co.*, 11 Pick. 85; *Hillock v. Traders Ins. Co.*, 54 Mich. 531.

firm name.<sup>1</sup> But a farming or non-trading partnership implies no such authority. Sanction or usage should appear.<sup>2</sup> Nor can one member of a firm of attorneys, as such, bind the firm by a post-dated check drawn in its name.<sup>3</sup> And the surrender of shares of stock, partnership property, to the corporation issuing them, has been held fraudulent and void, when made by one partner under suspicious circumstances.<sup>4</sup> One partner has power to represent and act for the firm in legal proceedings.<sup>5</sup>

From the mere fact that the partnership relation exists, one partner has no implied authority to bind the firm to others by opening a bank account in his own name.<sup>6</sup> Nor to draw a bill of exchange or note in his own name, even though he apply the proceeds for partnership purposes.<sup>7</sup> Nor to pay his private debt by a check in the firm's name.<sup>8</sup> For a creditor may be charged with constructive knowledge that the transaction is out of the partnership scope; and whenever a person deals with one of the partners in a transaction of this sort, the law concludes, unless there are circumstances or proof in the case sufficient to destroy the presumption, that he deals with him on the partner's private account, notwithstanding the partnership name be assumed.<sup>9</sup>

<sup>1</sup> *Kimbro v. Bullitt*, 22 How. 256; *Tolman v. Hanrahan*, 44 Wis. 133; *Wagner v. Simmons*, 61 Ala. 143. Borrowing money on the credit of a partner's individual note does not create by presumption a partnership debt, though the money be applied to partnership purposes. *Peterson v. Roach*, 32 Ohio St. 374. Unless the firm name is used in the same connection in an apparently proper way. *Redlon v. Churchill*, 73 Me. 146. See also 48 Iowa, 503; 44 Wis. 133; *Para. Partn.* §§ 131-146.

<sup>2</sup> *McCrary v. Slaughter*, 58 Ala. 230; 22 How. 256; 33 La. Ann. 196; *Dowling v. Bank*, 145 U. S. 512.

<sup>3</sup> *Forster v. Mackreth*, L. R. 2 Ex. 163.

<sup>4</sup> *Comstock v. Buchanan*, 57 Barb. 127.

<sup>5</sup> *Para. Partn.* § 118; 8 T. R. 25.

<sup>6</sup> *Alliance Bank v. Kearsley*, L. R. 6 C. P. 433.

<sup>7</sup> *Le Roy v. Johnson*, 2 Pet. 186. See *Para. Partn.* § 138; *Gansevoort v. Williams*, 14 Wend. 133; *Peterson v. Roach*, 32 Ohio St. 374; *Lill v. Egan*, 89 Ill. 609.

<sup>8</sup> *Davis v. Smith*, 27 Minn. 337. A presumption of fraud arises in cases where one partner uses the name and credit of the firm in settling up what are manifestly his own private transactions. *Para. Partn.* § 112, and cases cited; *Ellston v. Deacon*, L. R. 2 C. P. 20; *Story Partn.* § 172 *et seq.*

<sup>9</sup> 3 Kent Com. 43, and notes; *Story Partn.* § 133; *Doty v. Bates*, 11 Johns. 544.

The attempt of a partner to apply the partnership property in payment of his private debt will not therefore, under all circumstances, divest the title of the firm in favor of the creditor, even though the latter had no express notice of fraud.<sup>1</sup> The rule is otherwise where a partner acts in fraud of his associates with strangers in a matter within the apparent scope of the partnership authority.<sup>2</sup> And it is a material circumstance against the other partners that they so entrusted goods or the transaction to the partner in question as to enable him to deceive the public as to his authority in the premises, and that he did deceive the third person accordingly.<sup>3</sup>

As to negotiable paper in general, which bears the firm name, the act of one partner binds all, whether it be by drawing, accepting, or indorsing, so far as third persons acting in good faith and without due notice are concerned, provided once more the transaction appear to have been fairly within the partnership scope.<sup>4</sup> But there are instances where the presumption of authority would be negatived by the facts; as in the case where paper is indorsed which does not belong to the firm, by way of accommodation or as an interchange of credit, which is much like attempting to place the firm in the position of a surety. Of course the firm is liable where such use of its name was authorized; and even accommodation paper bearing an indorsement by a single partner would be binding in the hands of a *bonâ fide* holder for value without knowledge of the circumstances under which it was procured.<sup>5</sup> A note given by a firm is not technically a joint and several obligation; the partners in all cases assume joint liabilities.<sup>6</sup> So too a note payable to A. and B. *prima facie* imports a note to a partnership.<sup>7</sup>

<sup>1</sup> See *Rogers v. Batchelor*, 12 Pet. 221; 21 Hun, 178; *Forney v. Adams*, 74 Mo. 138.

<sup>2</sup> 3 Kent Com. 46, citing *Willet v. Chambers*, Cowp. 814, &c. See *Hutchins v. Turner*, 8 Humph. 415.

<sup>3</sup> *Locke v. Lewis*, 124 Mass. 1; *Kelton v. Leonard*, 54 Vt. 230.

<sup>4</sup> *Michigan Bank v. Eldred*, 9 Wall. 544; *Arden v. Sharpe*, 2 Esp. 523;

*Etheridge v. Binney*, 9 Pick. 272; Pars. Partn. §§ 131-146, and notes; Story Partn. §§ 102, 126; *infra*, Bills and Notes.

<sup>5</sup> *Early v. Reed*, 6 Hill, 12; *Waldo Bank v. Lumbert*, 16 Me. 416.

<sup>6</sup> *Mason v. Eldred*, 6 Wall. 231; *Perring v. Hone*, 4 Bing. 28. See *Doty v. Bates*, 11 Johns. 544.

<sup>7</sup> *Murphy v. Stewart*, 2 How. 263.



Among the general rights of each partner as concerns the partnership property are those of making payment for the firm of the partnership debts, and of receiving payment of any and all debts due to the firm. And incidentally one partner may compromise a debt, or authorize legal proceedings for its recovery.<sup>1</sup> The liability of all the members of a firm in a suit prosecuted to judgment against them on the partnership account, with or without attachment of the partnership property, will be strictly enforced.<sup>2</sup> One partner may appoint an agent with authority to transact the joint business.<sup>3</sup> And a firm being by name empowered to act for a third party, one partner may sufficiently execute the agency.<sup>4</sup> But from a general power granted to one of two partners, the other can derive no authority.<sup>5</sup>

The rule has been that one partner cannot submit the interests of the firm to arbitration; the submission binding only himself.<sup>6</sup> The same exception seems to have existed at the civil law. But why a partner should be specially restrained in this respect, it is hard to say.<sup>7</sup>

There are, however, technical objections to the power of a partner to bind the firm by executing a deed; the ancient rule of our law being that a partnership has no seal, while authority to seal should be conferred by seal. A general partnership agreement under seal could confer no such authority.<sup>8</sup> But this does not prevent one partner from executing a valid deed on behalf of the firm if his copartners are present and consent.<sup>9</sup> And the old rule is now greatly

<sup>1</sup> Pars. Partn. § 116. But see *Hamridge v. De La Crouée*, 3 M. G. & S. 742.

<sup>2</sup> *Ib.*; *Inbusch v. Farwell*, 1 Black, 566.

<sup>3</sup> *Tillier v. Whitehead*, 1 Dall. 269; *Lucas v. Bank of Darien*, 2 Stew. 280; 39 Mich. 108.

<sup>4</sup> *Kennebec Co. v. Augusta Ins. & Bank Co.*, 6 Gray, 204.

<sup>5</sup> *Edmiston v. Wright*, 1 Campb. 88.

<sup>6</sup> *Karthauss v. Ferrer*, 1 Pet. 222; *Buchanan v. Curry*, 19 Johns. 187.

In some States a partner may thus bind, as matter of law, by his unsealed agreement. 3 B. Mon. 435; 12 S. & R. 243; Pars. Partn. § 121, n.

<sup>7</sup> See Pars. Partn. § 121; *Southard v. Steele*, 3 B. Mon. 436; *Taylor v. Coryell*, 12 S. & R. 243; 3 Kent Com. 49, and n.; *Story Partn.* § 114.

<sup>8</sup> 2 Kent Com. 47, 48, and n.; Pars. Partn. §§ 122-124, and notes; *Tom v. Goodrich*, 2 Johns. 213.

<sup>9</sup> *Harrison v. Jackson*, 7 T. R. 207.

relaxed in American practice, through the intervention of equity doctrines. Even an absent partner is held bound by a deed executed on behalf of the firm by his copartner, if he gave either a previous parol authority or subsequently confirmed the act.<sup>1</sup> So the seal to an instrument is sometimes held mere surplusage, as in the case of a mortgage of personal property, or an assignment for the benefit of creditors, or the release of a debt.<sup>2</sup> And though one partner for want of authority may not bind his copartners by the execution of a sealed instrument in the name of the firm, yet in conformity to the general doctrines of agency he necessarily binds himself.<sup>3</sup> Yet in several late American cases the general power of one to bind the others of his firm by a specialty is still emphatically denied, and he binds accordingly only himself, unless authorized.<sup>4</sup>

§ 189. **The Same Subject.** — The power to dispose of the partnership property may be exercised by a single partner in a variety of ways; always assuming that the case is free from collusion, and the transaction within the general scope and ordinary objects of the partnership. A partner may pledge, or, if no seal be requisite, mortgage, the personal effects as well as sell them, and under corresponding restraints. Fraud and collusion would perhaps be more readily presumed in case of an assignment of the stock by way of pledge or mortgage by a single partner, than where goods are sold on delivery, or money paid over; and yet there are instances where a pledge or mortgage of the whole stock in trade by one of the partners to secure a firm creditor has been upheld, the creditor having acted reasonably and in good faith.<sup>5</sup> It

<sup>1</sup> See Kent and Parsons, *supra*; Anthony v. Butler, 13 Pet. 423, 433; Story Partn. §§ 119-122; Worrall v. Munn, 1 Seld. 221.

<sup>2</sup> Milton v. Mosher, 7 Met. 244; Harrison v. Sterry, 5 Cr. 289; 47 Wis. 261; Wells v. Evans, 20 Wend. 251; *Ex parte* Hodgkinson, 19 Ves. 291; Schmertz v. Shreever, 62 Penn. St. 457.

<sup>3</sup> Bowker v. Burdekin, 11 M. & W. 128; Elliot v. Davis, 2 Bos. & P. 338.

<sup>4</sup> Gibson v. Warden, 14 Wall. 244; Walton v. Tresten, 49 Miss. 569; Williams v. Gillies, 75 N. Y. 197; Russell v. Annable, 109 Mass. 72; Pars. Partn. § 124. It is held that a partner may bind the firm by a sealed note executed in the name of the firm; at least to a certain extent. Walsh v. Lennon, 98 Ill. 27.

<sup>5</sup> See 3 Kent Com. 46, and *n.*; Tapley v. Butterfield, 1 Met. 515; Pars. Partn. §§ 177-183, *n.*; Sweet-

should be observed that, as a partner's own interest in the copartnership property is his due proportion of a residue to be found upon a final balance, he can hardly transfer his own interest in the partnership stock effectually to a stranger without dissolving the partnership altogether.<sup>1</sup>

As a general rule, and with but rare exceptions on familiar principles as to a *bond fide* purchaser or transferee for value without notice, the purchaser, pledgee, or transferee of one partner's interest can acquire no title to assets beyond the latter's share in such surplus as may remain upon a winding up of the firm business;<sup>2</sup> and where a partner thus disposes of firm personalty without the knowledge of his copartners and in fraud of their rights, for his individual debt, the purchaser is held to acquire no full title thereto as against the partnership creditors.<sup>3</sup>

The admissions, representations, and misrepresentations of a partner are binding on the firm, provided they relate to and are made in the course of the partnership business and within its proper scope and contemporaneously. And even the acknowledgment of an existing debt by a single partner, while the partnership continues, will take the case out of the Statute of Limitations; though on principle such an acknowledgment made after the partnership is dissolved can have no such effect.<sup>4</sup> One partner cannot, in the absence of usage or special circumstances, bind the firm by the

*zer v. Mead*, 5 Mich. 107; *Reid v. Hollinshead*, 4 B. & C. 867; s. c. 7 D. & R. 444. As to a mortgage, the necessity of formalities under seal may sometimes affect the question. A partner may assent to the transfer of a partnership debt from one banker to another. See *Beale v. Caddick*, 2 H. & N. 326; *Arnold v. Brown*, 24 Pick. 89; *Winship v. Bank of United States*, 5 Pet. 561.

<sup>1</sup> Pars. Partn. § 306; 11 Barb. 140; *Tarbell v. West*, 86 N. Y. 280. See § 185, note.

<sup>2</sup> *Staats v. Bristow*, 73 N. Y. 264.

<sup>3</sup> This rule applies most strongly if the transferee was cognizant of the

fraud. But even the transferee's innocence will not here avail him. *Tarbell v. West*, 86 N. Y. 280; *Liberty Savings Bank v. Campbell*, 75 Va. 534; *Forney v. Adams*, 74 Mo. 138; 59 Ala. 338. And see 37 Ark. 228; *Hartley v. White*, 94 Penn. St. 31. And as to the right of the firm itself to recover such property, see *Johnson v. Crichton*, 56 Md. 108.

<sup>4</sup> 3 Kent Com. 50, 51; *Story Partn.* § 107; Pars. Partn. §§ 126-129, and notes; *Bell v. Morrison*, 1 Pet. 351; *Shoemaker v. Benedict*, 1 Kern. 176; *Turner v. Smart*, 6 B. & C. 603. See 163 Mass. 527.

guaranty of a third person's debt, nor make his fellow-partners liable as mere sureties without their consent.<sup>1</sup>

§ 190. **Liability of Firm for Fraud, etc., of Partner.** — Partnership contracts involving fraud and deceit are closely allied to the law of torts. The rule is that partners are liable *in solido* for the tort of one, if that tort were committed by the partner as such, and in the course of the partnership business; but not otherwise unless the wrongful act were authorized or adopted by the firm.<sup>2</sup> The connivance of copartners in a fraudulent transaction, and their voluntary participation in accruing profits, are circumstances which would justify the court in making all jointly responsible.<sup>3</sup> But there are cases which tend to relax the rule of partnership liability somewhat more in torts than contracts, agreeably to the general rules of agency, so as to shield innocent partners who had no actual knowledge of the wrong committed, nor had consented thereto, from the consequences of a partner's misconduct; though this holds true in the case of a pure tort rather than where wrongful transactions grow out of a contract.<sup>4</sup>

§ 191. **Rights and Duties of Partners as between themselves.** — Thus far we have considered the power of a single

<sup>1</sup> 3 Kent Com. 47, and *n.*; Pars. Partn. §§ 119, 144; Story Partn. §§ 127, 245; Foot v. Sabin, 19 Johns. 154; Rollins v. Stevens, 31 Me. 454; Russell v. Annable, 109 Mass. 72. But as to a guaranty of profits under a sale, see Jordan v. Miller, 75 Va. 442. A guaranty may become binding on the firm by ratification. Clark v. Hyman, 55 Iowa, 14.

A member of a firm cannot confess judgment for a firm debt. Pars. Partn. § 125; 91 U. S. 170. He has certainly no right to enter appearance for his firm after its dissolution. Hall v. Lanning, 91 U. S. 160. See *post* as to dissolution.

As to binding one partnership by the acts of another having a common member, see Cobb v. Illinois Central R., 38 Iowa, 601.

One partner may buy goods for the concern, whether for cash or on credit, so as to bind the firm. Johnston v. Bernheim, 86 N. C. 339; 14 Nev. 265. And see Cameron v. Blackman, 39 Mich. 108; 21 Kan. 26.

As to liability of partners for rent under a lease, see Stillman v. Harvey, 47 Conn. 26.

<sup>2</sup> Brydges v. Branfill, 12 Sim. 369; Locke v. Stearns, 1 Met. 564; Pars. Partn. §§ 100, 102; Graham v. Meyer, 4 Blatchf. 129; Coll. Partn. Am. ed. § 738; Story Partn. §§ 234, 256.

<sup>3</sup> *Ib.*; Castle v. Bullard, 23 How. 173; Coleman v. Pearce, 26 Minn. 123; Tenney v. Foote, 95 Ill. 99.

<sup>4</sup> Floyd v. Wallace, 31 Ga. 688; McKnight v. Ratcliffe, 44 Penn. St. 156.

partner as concerns the public. The rule is quite different when we come to apply it as between the partners themselves; for here the power of a single partner to bind the firm may be and is frequently modified by the partnership agreement. If there be written articles constituting the partnership, the power and authority of the partners *inter se* must be ascertained and regulated by the terms and conditions of those articles.<sup>1</sup> As between themselves, partners may control and appropriate the firm assets in the adjustment of mutual claims in any manner they may choose.<sup>2</sup> Nor as against his copartners, can a partner, without being duly authorized, make, accept, or indorse negotiable paper, unless the act is both within the scope of the partnership business and actually on account of the firm.<sup>3</sup> Equity will enjoin one partner from violating the rights of his copartner in partnership matters, although no dissolution of the partnership be contemplated.<sup>4</sup>

Partners should observe perfect good faith with one another; nor should any member of a firm transact independent business to the material injury of his associates, or otherwise place himself in a situation where his bias is likely to be against the common interests.<sup>5</sup> A partner may traffic quite outside the scope of the firm business for his own profit and advantage; but if he secretly engages in the same business by himself, equity will subject his gains to the common benefit of the partnership.<sup>6</sup> Involved partnerships, where one individual connects himself with different firms engaged in the same kind of occupation or business, ought not to be greatly favored; for when one undertakes to serve two rivals who antagonize, he is likely to transfer his affections from one to the other according to the dictates of

<sup>1</sup> Kimbro v. Bullitt, 22 How. 256; Story Partn. §§ 169-186, and cases cited.

<sup>2</sup> McCormick v. Gray, 13 How. 26.

<sup>3</sup> See *supra*, § 188; Etheridge v. Binney, 9 Pick. 272.

<sup>4</sup> Marble Company v. Ripley, 10

Wall. 339. As to remedies of partners in general, see Pars. Partn. cs. 8-10.

<sup>5</sup> Story Partn. §§ 123-125; Pars. Partn. §§ 150-156; Murrell v. Murrell, 33 La. Ann. 1233.

<sup>6</sup> Latta v. Kilbourn, 150 U. S. 524; Kimberly v. Arms, 129 U. S. 512.

greedy self-interest rather than of duty. We are told that the Roman lawyers stigmatized that partnership where one tries to reap all the advantages for himself as the *societas leonina*, in allusion to the fable of the lion who went hunting with the other wild animals, and took all the prey as his own share.<sup>1</sup> Each partner owes an amount of time, care, and trouble to the concern commensurate with his interest, or according to the mutual intent of the partnership. One partner ought not to exclude the others from advice or management; though, as controversies must exist even when all have been consulted, it appears to be settled that a majority in interest of the firm acting in good faith may bind the minority in interest.<sup>2</sup>

§ 192. **Dissolution and Change of a Partnership; how effected.**—*Thirdly.* As to the dissolution and change of a partnership. A partnership may be dissolved in a variety of ways: by limitation of the period named in the partnership articles; by the voluntary act of all the partners whenever they may choose; often by the act of a single partner, amounting to withdrawal, since partnerships formed without limitation as to time are at will only; by the death of a partner; generally in fact by a change in the firm membership; also by decree

<sup>1</sup> Pothier Contr. de Soc. c. 3; 3 Kent Com. 29, 51, 52.

<sup>2</sup> Pars. Partn. § 149; Peacock v. Cummings, 46 Penn. St. 434; Kirk v. Hodgson, 3 Johns. Ch. 400; Johnston v. Dutton, 27 Ala. 245; 3 Kent Com. 45, 46; Story Partn. §§ 169, 175. A partner cannot by purchase become the individual owner of an outstanding note against the concern. Easton v. Strother, 57 Iowa, 506. A partner cannot usually charge his firm with interest. Topping v. Pad-dock, 92 Ill. 92. But one may be entitled to interest on money advanced for the firm's use under fair circumstances. Baker v. Mayo, 129 Mass. 517. As to one's claiming special allowance for services to the firm (which ordinarily is not proper),

see Godfrey v. White, 43 Mich. 171; 8 Daly (N. Y.), 176; Cramer v. Bachmann, 68 Mo. 310; 40 Mich. 457. An attorney repudiating his partnership obligations in a cause entrusted to his firm cannot claim a share in the fees subsequently earned by his partners. Denver v. Roane, 99 U. S. 355. A partner may, for his delinquency, be chargeable with interest to the firm. 30 N. J. Eq. 540.

The powers of partners are co-ordinate, whether the partnership is in active operation or subsists only for the purpose of winding up its affairs; and each partner ought to keep precise accounts of all his transactions for the firm, and keep them ready for inspection. 48 Md. 223.

of a court of equity or proceedings in bankruptcy.<sup>1</sup> A partnership, or *quasi* partnership, which has been formed for a single purpose or transaction, ceases as soon as the business is completed.<sup>2</sup> Where the court interferes to pronounce a dissolution, the cause should be a weighty one; for in case of the minor misconduct of a copartner, and general grievances requiring redress, the milder remedy of injunction which puts a stop to further mischief is preferred.<sup>3</sup> A legal adjudication of bankruptcy or of insolvency against either the firm or a partner works a dissolution; but not simple insolvency, or mere inability to pay.<sup>4</sup> Fraud in the original creation of the partnership is ground for judicial dissolution;<sup>5</sup> and so is the culpable misconduct or insanity of a partner, or even an essential change of circumstances if thereby the purposes of the partnership become incapable of fulfilment.<sup>6</sup> Visionary schemes will sometimes be dispelled by the court, and deluded partners released.<sup>7</sup> And of course, where war breaks out, a partnership between citizens of the opposing governments must necessarily come to an end.<sup>8</sup> Courts of equity exercise a liberal jurisdiction over granting a dissolution, which is usually for causes arising after the partnership was formed.

<sup>1</sup> 3 Kent Com. 53; Pars. Partn. § 280 *et seq.*; Story Partn. §§ 265-319.

<sup>2</sup> 3 Kent Com. 52, 53.

<sup>3</sup> Pars. Partn. §§ 206, 207; Howell v. Harvey, 5 Ark. 278; Goodman v. Whitcomb, 1 Jac. & W. 569; Fischer v. Raab, 57 How. (N. Y.) Pr. 87; 17 Ch. D. 529.

<sup>4</sup> 3 Kent Com. 58-60; Pars. Partn. § 368; Siegel v. Chidsey, 28 Penn. St. 279; Crawshaw v. Collins, 15 Ves. 217. Where partnership and individual property are assigned in bankruptcy, the court prefers, as far as practicable, to apply partnership assets to the partnership debts, and individual assets to individual debts. 133 U. S. 670.

<sup>5</sup> Hynes v. Stewart, 10 B. Monr. 429; Fogg v. Johnston, 27 Ala. 432.

<sup>6</sup> Story Partn. §§ 291-294; 3 Kent Com. 62; Pars. §§ 360, 361; Harrison v. Tennant, 21 Beav. 482; Claiborne v. Creditors, 18 La. 501.

<sup>7</sup> Baring v. Dix, 1 Cox, 213; Beaumont v. Meredith, 3 Ves. & B. 180; 8 Or. 84; Pars. § 357.

<sup>8</sup> 3 Kent Com. 62; Griswold v. Waddington, 15 Johns. 57; Pars. § 357. A written agreement for dissolving a partnership supersedes all prior or contemporaneous agreements on the subject. Bragg v. Geddes, 93 Ill. 39. Any partner of a firm formed for an indefinite time may retire and dissolve the partnership whenever he chooses, if his act be *bona fide*. Fletcher v. Reed, 131 Mass. 312; 11 App. Cas. 298. For effect of his assignment, see 135 U. S. 621.

§ 193. **Consequences of Dissolution as to the Parties and the Public.** — In general, a dissolution of partnership puts an end to the authority of one partner to dispose of the common property; it operates as a revocation of all power to make new contracts or impose new liabilities upon the late firm; and the rights of the partners as such extend no farther than to settle the partnership concerns and distribute the funds.<sup>1</sup> This right may be restrained by a delegation of the authority to one of the late partners; and frequently either the original articles or a special agreement made upon dissolution provide how outstanding accounts shall be adjusted, who shall collect and pay the old debts, and how the concern in fact shall be wound up.<sup>2</sup> Independently of special agreements, however, each of the late partners has full authority, notwithstanding the dissolution, to pay up and settle the outstanding debts, receive payment of sums owing the firm, compromise, discount, and give acquittance much the same as before; though here we are speaking of partners *inter se*, for, as concerns innocent third parties, a single partner may have greater power to bind his late associates.<sup>3</sup> Where the equality of rights on dissolution is restrained by agreement, the partner delegated to wind up the concern may indorse partnership notes, transfer by indorsement without recourse, sell, compromise, release, pledge collaterals, and otherwise do such acts as are reasonable and incident to the purpose of winding up, not renewing, the business. He is a trustee for the benefit of all, and will be treated in equity accordingly.<sup>4</sup>

But the consequences of a dissolution, as regards third persons, are quite different; and nothing can shield the members of the late firm from liability to the public on new

<sup>1</sup> Bell v. Morrison, 1 Pet. 352; Pars. Partn. § 286 *et seq.*; Story Partn. §§ 320-356. See Bank v. Carrollton Railroad, 11 Wall. 624; 91 U. S. 160.

<sup>2</sup> Pars. *ib.*; National Bank v. Norton, 1 Hill, 572.

<sup>3</sup> Pars. Partn. §§ 289-295; Butchart v. Dresser, 10 Hare, 453; Wood-

ford v. Downer, 13 Vt. 522; Darling v. March, 22 Me. 184; Robbins v. Fuller, 24 N. Y. 570.

<sup>4</sup> Pars. *ib.*; Parker v. Macomber, 18 Pick. 505; Bennett's Case, 18 Beav. 339; Dunlap v. Watson, 124 Mass. 305. A decree for dissolution of a firm should provide for an accounting.



contracts made apparently on the partnership account, but proper notice that the partnership exists no longer. For, until notice is given, the situation of each individual is essentially that of a nominal partner; he is to the world the same member of a firm that he was before. An outgoing partner can discharge himself from future liability to others, and indeed the partnership liability can be terminated altogether as to the public, by notice, express or by publication. Public notice is conclusive on those who have not had prior dealings with the firm; and as to others, it is a question for the jury whether it amounted to notice in fact under all the circumstances.<sup>1</sup> Furthermore, we must remember that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future;<sup>2</sup> and the late partnership is not released from its liability on an outstanding and unexecuted transaction.

But the reason of the rule requiring notice of dissolution to be given to the public extends only to the duty of making third persons acquainted with the fact that a dissolution has taken place, so that subsequent dealings with members of the late firm or their successors may be regulated by such persons understandingly. For all this, the question, what is a sufficient notice to the public, gives rise to much discussion in the courts. The custom and necessity of notice is recognized generally by the commercial world; and sometimes the notice is given orally, sometimes by advertisement, sometimes by letter to those dealing with the firm, sometimes by a change of name on the sign-board; and more frequently by two or more of these methods combined.<sup>3</sup> A distinction is made, in such cases, between old customers and new ones, founded upon an obvious propriety; and while, as to members of the former class, either express notice of a dissolution must be shown, or it must appear that there was actual

<sup>1</sup> Pars. Partn. § 299 *et seq.*; Story Partn. § 160; 3 Kent Com. 66-68.

<sup>2</sup> Heath, J., in *Wood v. Braddick*, 1 Taunt. 104.

<sup>3</sup> See Buller, J., in *Tatlock v. Har-* ris, 3 T. R. 180; Story Partn. §§ 160, 161; 3 Kent Com. 66-68; Pars. Partn. §§ 299, 315 *et seq.*; *Davis v. Keyes*, 38 N. Y. 94; *Lange v. Kennedy*, 20 Wis. 279.

knowledge on their part, or at least adequate means of obtaining actual knowledge, in order to relieve the retiring partner from liability, the latter is sufficiently protected against new customers if he gives notice by public advertisement, or otherwise, in the usual way and to the usual extent; since of course one does not know who are going to be future dealers with the firm.<sup>1</sup> Less than this is unsafe; though knowledge of the dissolution, however acquired, by an individual, renders notice to him unnecessary.<sup>2</sup> Questions of notice, we may add, usually arise in determining the rights and liabilities of an outgoing partner.

• A partnership agreement of dissolution, which throws the partnership liability upon those who remain or the successors of the old firm, may be made binding upon a creditor by his making himself in some way a party to the agreement; in which case something like the civil-law doctrine of *novation* of the debt takes place. The creditor's right of appropriating payments made on account, whether to the old debt in which the retiring partner is concerned, or to the new debt

<sup>1</sup> Carter v. Whalley, 1 B. & Ad. 11; Benton v. Chamberlin, 23 Vt. 711; Goddard v. Pratt, 16 Pick. 448; Cregler v. Durham, 9 Ind. 375.

<sup>2</sup> Hart v. Alexander, 2 M. & W. 484; Merrit v. Pollys, 16 B. Monr. 355; 78 Ind. 365. Cf. as to new parties becoming creditors where no public notice of dissolution had been given, but only private notice, Polk v. Oliver, 56 Miss. 566; Richardson v. Snider, 72 Ind. 425; 65 Ga. 593. Mere rumor of a dissolution of the firm, whose members act inconsistently with such an idea, will not serve as actual notice. 2 McCrary, 307. This subject of notice is well discussed in Polk v. Oliver, 56 Miss. 566. And see Dickinson v. Dickinson, 25 Gratt. 321.

Contracts prescribing the terms on which old partners retire and new ones enter are frequently made at the present day, but such contracts are to be justly and equitably construed

as between themselves. See 70 Ind. 464; 73 Ind. 80; 44 Mich. 13. A retiring partner should, as to the public, take heed not to permit the continued use of his name in the firm. Richards v. Hunt, 65 Ga. 342; 65 Ala. 471; *supra*, §§ 177, 178; Gammon v. Huse, 100 Ill. 234; Uhl v. Harvey, 78 Ind. 365; 2 Lowell, 66; Speer v. Bishop, 24 Ohio St. 598. See Scarfe v. Jardine, 7 App. Cas. 345, as to the creditor's election to sue the old or new firm in such a case. When a partner retiring from the firm consents that his copartners shall have possession of the old place and the future conduct of the business under the old name, the good-will and the firm's trade marks go to the latter. Merrendez v. Holt, 128 U. S. 514. But without any such clear consent, the retiring partner's name cannot be used, nor is the good-will assigned by him. Gray v. Smith, 43 Ch. D. 208.

of the new firm, has a direct bearing upon the discussion of this principle. Novation by agreement would affect the case of an incoming partner, who agrees to assume the old debts.<sup>1</sup> In general, no such retrospective liability attaches to a new partner; though, like any other partner, he is liable for all the new debts; and he may, by his acts and conduct, as well as by express promise, place himself in a like position with reference to the old debts.<sup>2</sup>

§ 194. **Dissolution by Death; Surviving Partner, etc.** — The consequences of a dissolution are quite frequently discussed in case one of the partners has died, and the partnership is consequently brought to an end.<sup>3</sup> What are the rights and liabilities of the surviving partners, and upon what basis shall the representatives of the deceased partner procure a settlement? We have observed that partnership differs from joint tenancy in having no such thing as survivorship. There is, however, a species of survivorship, by virtue of which the surviving partners are permitted to manage the firm business, so far as pertains to the winding up and final settlement of the affairs of the partnership; their powers being commensurate with their duties in this respect.<sup>4</sup> It is common

<sup>1</sup> Pars. Partn. §§ 325, 326; *Ex parte* Jackson, 1 Ves. Jr. 181; *Hart v. Tomlinson*, 2 Vt. 101; *Lyth v. Ault*, 7 Ex. 667.

<sup>2</sup> If a partner absconds, his co-partner may take exclusive possession of the firm property for the benefit of the firm. *Hammill v. Hammill*, 27 Md. 679.

<sup>3</sup> In general, the death of a partner dissolves the firm. Pars. Partn. §§ 299, 342, 343; 40 Mich. 343, 347. But the business may, under the co-partnership contract, continue longer, through representatives of the deceased partner. 7 Pet. 594; *Schouler Executors*, § 326; 14 Gray, 195.

<sup>4</sup> Story Partn. § 342; Pars. Partn. §§ 344-352; *Burwell v. Mandeville*, 2 How. 560; *Crawshay v. Collins*, 15 Ves. 226; *Dyer v. Clark*, 5 Met. 562; *Evans v. Evans*, 9 Paige, 178; 1 Eq.

Ca. Abr. 290; *Wickliffe v. Eve*, 17 How. 468; *Schoul. Ex'rs*, §§ 325, 326; *Arnold v. Arnold*, 90 N. Y. 580; *Heath v. Waters*, 40 Mich. 457. In some States the surviving partner is required by statute to give bonds for the faithful performance of his trust. 70 Ind. 381. Where a partnership is dissolved, and one partner dies before the partnership affairs are settled, the above rule of survivorship also applies. *Strange v. Graham*, 56 Ala. 614.

The surviving partner may at discretion mortgage or pledge the assets for partnership debts. 35 Ch. D. 7. And in general manage and hold the firm property for closing up affairs. *Riddle v. Whitehill*, 135 U. S. 621. For his liability to the representatives of deceased in case he carries on the business continuously, see 138 U. S. 464.

to say that the surviving partners are for these purposes treated as trustees for all parties concerned; and courts of equity certainly superintend the exercise of powers of this kind, as in the case of other trustees; looking carefully after the interests of all beneficiaries, and interposing to prevent negligence, delay, and misconduct generally on the part of those whose duty it is to be honest, prudent, and expeditious. Yet surviving partners are evidently unlike ordinary trustees in many respects; for their own beneficial interests are involved in the trust; and while a sale from the deceased partner's representatives to themselves would be strictly scrutinized, there is no rule which prevents them from becoming the purchasers under such circumstances.<sup>1</sup> Sometimes a deceased partner gives by his will to his surviving partner the power to carry on the business for a certain time, retaining meanwhile the interest of the deceased in the funds of the partnership. In this case the surviving partner may do so, complying with the directions and conditions of the will.<sup>2</sup> But while the testator, in doing so, may bind all or only a specific part of his estate, an intention to render his general assets liable is not to be readily presumed.<sup>3</sup> Partnership articles which provide how the business of the firm shall be closed up or conducted in case of the death of a partner, should always be regarded.<sup>4</sup>

The choice of persons is an essential element in every partnership; and as a new partner cannot be introduced into a firm without the consent of every member of the firm, the executors of a deceased partner do not become partners in his stead unless by virtue of special stipulations in the original articles of partnership to that effect.<sup>5</sup> Nor in general are the assets of a deceased partner liable for debts contracted after his death, except under the direction of his will which

<sup>1</sup> *Chambers v. Howell*, 11 Beav. 6; 335; *Story Partn.* § 346; *Partn. Simmons v. Leonard*, 3 Hare, 581; 355.

*Pawsey v. Armstrong*, 18 Ch. D. 698. <sup>3</sup> *Burwell v. Mandeville*, 2 How. 560.  
But see *Sigourney v. Munn*, 7 Conn. 11.

<sup>4</sup> *Suydam v. Owen*, 14 Gray, 195.

<sup>5</sup> *Story Partn.* § 5; 3 *Kent Com.* 57, 59.

authorizes the trade to go on.<sup>1</sup> It would appear, from various late authorities, that, ordinarily speaking, one cannot sue the estate of a deceased partner directly for a partnership debt; he must first resort to the surviving partner.<sup>2</sup> But if the surviving partner has paid more than his proportion of the firm debts, he can claim repayment from the estate of the deceased.<sup>3</sup> No notice need be given by the representatives of the deceased to avoid future liabilities; nor as a rule are surviving partners required to give notice of such dissolution of the firm.<sup>4</sup> Whatever powers may have been given by will to an executor to carry on the trade of the deceased, — whether to become a partner, or, as a partner, to conduct the business for the benefit of the representatives of the deceased, — must be strictly construed; and under ordinary circumstances an executor who undertakes to carry on the testator's business after his death, though only on behalf of the persons interested in the testator's estate, will make himself liable, both in person and estate, for its engagements; <sup>5</sup> yet he incurs no such hazardous risk by merely leaving the decedent's property in the concern.<sup>6</sup>

§ 195. **General Conclusions as to the Ownership of Personal Property as Partners.** — For combining successfully the wealth and labor of individuals in the transaction of extensive business operations, we find, then, that the partnership relation presents some decided advantages over that of joint or common ownership, which is adapted rather to mere beneficial investment. A large capital well bestowed and skilfully

<sup>1</sup> *Ib.* And see Schoul. Ex'rs, §§ 325, 326.

<sup>2</sup> *Wallace v. Fitzsimmons*, 1 Dall. 248; *Richards v. Heather*, 1 B. & Ald. 29; *Smyth v. Hawthorn*, 2 Rawle, 355; *Voorhis v. Childs*, 17 N. Y. 359. But modern statutes are found to change this rule, and equity disregards the strict rule of preference, all rights being adjusted finally. *Schouler Ex'rs*, § 379.

<sup>3</sup> *Busby v. Chenault*, 13 B. Monr. 554.

<sup>4</sup> *Marlett v. Jackman*, 3 Allen, 252

287; *Burwell v. Mandeville*, 2 How. 560; *Downs v. Collins*, 6 Hare, 418.

<sup>5</sup> *Pars. Partn.* § 355; *Ex parte Garland*, 10 Ves. 119; *Story Partn.* § 106; *Alsop v. Mather*, 8 Conn. 587; *Schouler Ex'rs*, § 326. As to the rights of a deceased partner's estate, where the surviving partner carries on the business and the concern fails, see *Hoyt v. Sprague*, 103 U. S. 613.

<sup>6</sup> *Pars.* § 356, notes; *Willis v. Sharp*, 113 N. Y. 586; *Mattison v. Farnham*, 44 Minn. 95; 59 Miss. 305;

managed may produce wonderful results in creating, developing, and enlarging a business ; and with an increased hazard comes the hope, if successful, of larger aggregate gains. But there remains this decided drawback to putting personal property into partnership : that the more extensive the common operations, the greater must be the individual liability ; while each partner, moreover, is too much in the power and at the mercy of his associates as concerns the public. And, besides, there are those of means who wish to invest where they need not be under the necessity of exercising a constant vigilance ; who desire to embark in trade, manufacture, and commerce essentially, while leaving the active management to others and confining their own risk to the capital they have contributed.

To obviate such disadvantages, we find other modes contrived for enabling the owners of capital to combine for business operations and to invest in a common and convenient fund which may be actively employed in some well-defined pursuit of gain ; yet without incurring, for the most part, a hazard of loss beyond the amount of their respective investments, and with better facilities afforded for entering or leaving the common concern at individual choice. These combinations we shall consider at length in the next two chapters.<sup>1</sup>

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## CHAPTER X.

### MEMBERS OF LIMITED PARTNERSHIPS, AND OF JOINT-STOCK COMPANIES, AND SHIP-OWNERS.

#### § 196. Limited Partnerships ; Their Origin and Nature.—

I. The doctrine of limited partnerships was imported into the United States within a comparatively recent period from

Avery v. Myers, 60 Miss. 367 ; 48 N. J. L. 129.

<sup>1</sup> Upon the general subject of Partnership, see at length the latest edi-

tions of Prof. Theophilus Parsons and Mr. Justice Story on that subject, or of Sir N. Lindley's (English) work, as edited with American notes.

Continental Europe. By the ordinance of 1673, France first established partnerships of this sort, under the name of *La Société en Commandité*; and New York was the earliest of the American States to set up a similar system; this being, as Chancellor Kent observes, the first instance in the history of its legislation where the statute law of any other country than that of Great Britain has been closely imitated and adopted.<sup>1</sup> There is now scarcely an important State under our federal government where limited partnerships are not recognized; and although it is the policy of legislation in some parts of this country to prevent them from being formed for the transaction of banking, insurance, or other special kinds of business, yet the combination of persons as limited partners in the ordinary pursuits of trade is almost everywhere favored and protected in America. In England the limited partnership principle is not adopted as to individuals; but within the last quarter of a century we find it frequently applied with reference to joint-stock companies.<sup>2</sup> Wherever limited partnerships have been permitted, the system is found to have worked well and to have given universal satisfaction.

The main purpose of a limited partnership, as may be inferred from what we said at the close of the last chapter, is to aid and encourage trade and commerce, by inducing those to embark their wealth or a portion of it in business pursuits, who would shrink from encountering the risks which attend the ordinary partnership combinations. The new system relieves such persons from partnership liability beyond the extent of the capital furnished by each to the concern. And a limited partnership, in our modern sense, may therefore be defined as one in which one at least of the partners is a partner in the ordinary sense as to rights and liabilities, while at least one other person invests in the business and is liable to the extent of his investment, and no farther.<sup>3</sup>

<sup>1</sup> *Coope v. Eyre*, 1 H. Bl. 48; *Pothier Partn.* n. 60; *Pars. Partn.* 4th ed. § 421 *et seq.*; 3 Kent Com. 35, 36; *Troubat Lim. Partn.* § 39.

<sup>2</sup> *Lethbridge v. Adams*, L. R. 13 Eq. 547; *Stats.* cited *Pars. Partn.*

§ 421 n. Our latest tendency is to treat limited partnerships with still increasing favor. *White v. Eiseman*, 134 N. Y. 101.

<sup>3</sup> *Pars. Partn.* § 422; *Collyer Partn.* b. 1, c. 1, §§ 3, 99; 3 Kent Com. 34.

With us, this class of partnerships is usually allowed by general statute; but in England, rather by charter. In such a combination, those partners whose liability is unrestricted are called *general* partners; and those with limited liability, *special* or *limited* partners.<sup>1</sup>

Of course there is danger that, when partnership liability is relaxed, an adequate check to speculation will be wanting. This danger it is the aim of our legislation to guard against. Another danger appears in the temptation thus afforded to measure liabilities by the limited partnership standard after gaining undue credit with those who supposed themselves dealing with ordinary partners. This, too, the law seeks to prevent. Precautions are thus imposed by local statutes, to which all who propose doing business on the limited partnership plan are bound to conform.

§ 197. **The Same Subject.**—“That the statutes on limited partnership in the various States should be in substance identical,” says Mr. Troubat, “is perfectly natural; inasmuch as the common source, the commercial code of France, the work of the jurists of the Empire, has been largely borrowed from by them all.”<sup>2</sup> The statutes of the various States widely differ in text; and yet in leading details they are quite similar. There is usually a certificate to be recorded at the outset,—this more especially by way of caution to the public; and such certificate is to be published in some newspaper. Whenever the partnership is renewed or continued beyond the time originally agreed upon, a new certificate must be recorded and published in like manner. Provisions are also made as to the manner in which the partnership shall be conducted. And a public record of the fact of dissolution, with printed notice in the newspapers, is also requisite to make the dissolution effectual as against the world. Such are the principal features of our statutes of limited partnership.<sup>3</sup>

In some States there are no restrictions imposed, appar-

<sup>1</sup> 3 *Ib.* “Limited” partnership is sometimes styled “special” partnership.

<sup>2</sup> Troubat *Lim. Partn.* § 39.

<sup>3</sup> See e.g. *Mass. Pub. Sts.* (1882) c. 76.



ently, concerning the purposes for which individuals may enter into a limited partnership; but in others the kinds of business to be thus pursued are distinctly enumerated by statute. And in New York, Massachusetts, and the New England and Middle States generally, together with Ohio, California, Tennessee, Georgia, and numerous other Western and Southern States, the business of banking is specially excepted, as well as insurance, or at all events, one of these two classes; the reason, doubtless, being that pursuits of this kind, involving large hazards, requiring considerable capital, and exercising a potent influence upon society, are thought to be unsuitable to partnerships with a diminished responsibility, if indeed they should be conducted by partnership combinations at all.<sup>1</sup> Banking and insurance business is for the most part in this country monopolized by chartered corporations.

The legal existence of a limited or special partnership does not depend upon the public notice of its formation: the practical effect of failure to publish as the statute requires being that the partnership becomes a general one as concerns the public;<sup>2</sup> though a person may still remain a special partner towards his copartners.<sup>3</sup>

§ 198. **Limited Partnership; Preliminaries; Certificates, etc.**

— The preliminary certificate of a limited partnership is, in general, to be signed by all the parties to the combination; to specify the name or firm under which the partnership is to be conducted; to give the name and residence of each general or special partner, distinguishing who are general and who are special partners; to state the amount of capital which each special partner has contributed to the common stock, the nature of the business to be transacted, and the time when the limited partnership is to commence and when it is to terminate. This certificate must be acknowledged before a magistrate and recorded with the public records, in the place where the parties reside, or where the firm is to do

<sup>1</sup> Pars. Partn. §§ 421-430. As to the Louisiana partnership *in commendam*, under the Code, which is essentially a limited partnership, of similar

French derivation, see 32 La. Ann. 657; 33 La. Ann. 812.

<sup>2</sup> Tracy v. Tuffy, 134 U. S. 206.

<sup>3</sup> 89 Penn. St. 163; 131 U. S. 66.

business, or both, according to the terms of the local statute. And the method of advertising this certificate in the newspapers is also designated by statute.<sup>1</sup>

All of these statute preliminaries must be strictly pursued; for they are all measures of precaution, upon which the public, whose ordinary means of security are diminished, have a right to insist; and a mistake of substance, or an intended omission or error, whether by a general or special partner, throws all alike into the condition of an ordinary partnership. By this we mean that they are thereby made liable as ordinary partners to the public; for, as between themselves, notwithstanding the falsehood or error, their agreements might still be valid; the general principles applying which we discussed in the last chapter.<sup>2</sup>

So, too, it is common for our statutes to require the payment by the special partner of his specific sum "in cash," by way of partnership capital. A requirement so plain and so reasonable cannot be evaded or disregarded with safety. Where the special partner pays in notes, though they were treated as cash by the firm, he incurs the liability of a general partner.<sup>3</sup> Nor is a contribution of goods, or of credits or the assets, of another firm, or even of government bonds a "cash" payment.<sup>4</sup> Where the ostensible special partner invests, not his own, but another person's capital, the result appears to be held similar, and devices generally prove disastrous.<sup>5</sup>

<sup>1</sup> See *Para. Partn.* § 424; *Troubat*, c. 4.

<sup>2</sup> *Para. Partn.* §§ 424-426; *Richardson v. Hogg*, 38 Penn. St. 153; *Bowen v. Argall*, 24 Wend. 496; 67 Penn. St. 330; 6 Hill, 479; *Henkel v. Heyman*, 91 Ill. 96. Articles do not take effect until recorded; and, as to previous transactions, a general partnership liability is incurred. *Levy v. Lock*, 5 Daly (N. Y.), 46. If the partnership moves into another county, &c., a new certificate is requisite, within the intendment of legislation in many States. *Riper v. Poppenhausen*, 43 N. Y. 68.

<sup>3</sup> *Pierce v. Bryant*, 5 Allen, 91; *Haggerty v. Foster*, 103 Mass. 17.

<sup>4</sup> *Lineweaver v. Slagle*, 64 Md. 465; *Allen Re*, 41 Minn. 430.

<sup>5</sup> *Metropolitan Bank v. Strret*, 97 N. Y. 320. See *Bulkley v. Marks*, 15 Abb. Fr. 454. Contribution in "cash and goods" is not a "cash" contribution in compliance with the statute expression. *Van Ingen v. Whitman*, 62 N. Y. 518. And see *Haggerty v. Foster*, 103 Mass. 17. In general, property contributed by a special partner should comply with the local statute as to character, and the schedule and valuation should be clearly

But mere defects in the certificate, or record, or advertisement, do not vitiate, if merely formal, and honestly made, and if thereby a third party cannot be injuriously misled; for it is, after all, the possible injury to a third person which the courts mainly regard in matters of this kind. And as to the time of record or publication a reasonable rule is favored.<sup>1</sup> But in speaking of an injury to third parties as possible, we speak of a logical possibility; for it has been held that, where the certificate was published in two newspapers, and in one of them the sum contributed was said to be five thousand dollars, when in fact it was but two thousand dollars, the error being that of the printer, the special partners are liable as general partners; and this, too, without proof that the creditors were misled by the misprint.<sup>2</sup>

§ 199. **Limited Partnership; Business, how conducted.** — The business of a limited partnership is usually to be conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word "company" or any other general term. Nor must the special partner make personally any contract with third persons relative to the business of the firm. And, contrary to the rule of ordinary partnerships, all suits respecting the partnership business are to be prosecuted by and against the general partners only; cases, of course, being excepted, where the special partners have laid themselves open to the liabilities of general partners. Provisions of this sort will frequently be found among the local statutes which set forth the manner in which the concerns of a limited partnership shall be managed, so as to shield those whose purpose it is to risk only a specific sum in the hazards of trade.<sup>3</sup> It must hence follow

expressed if "cash" is not the sole prerequisite. *Maloney v. Bruce*, 94 Penn. St. 249; 3 Col. 342. The special partner's capital is of course protected against misappropriation or undue loss upon contracts made by the general partners so far as the policy and scope of legislation sanctions, he being free from blame. See *Snyder v. Leland*, 127 Mass. 291;

*Seibert v. Bakewell*, 87 Penn. St. 506.

<sup>1</sup> *Ib.*; *Lachaise v. Marks*, 4 E. D. Smith, 610; *Madison County Bank v. Gould*, 5 Hill, 309; *Bowen v. Argall*, 24 Wend. 496; *Bradbury v. Smith*, 21 Me. 117; *White v. Eisenman*, 134 N. Y. 101.

<sup>2</sup> *Smith v. Argall*, 6 Hill, 479.

<sup>3</sup> See Mass. Pub. Sta. (1882) c.

that the special partner can take no active part in the firm transactions, nor even allow his name willingly to be used in any partnership contract, without incurring those very responsibilities which he has sought to avoid.<sup>1</sup> It is held, moreover, that a special partner can neither transact firm business nor bind the firm by attempting to do so.<sup>2</sup> And as a matter of further wise precaution, our legislators expressly forbid the reduction of the capital stock, during the continuance of such a partnership, below the sum stated in the certificate, whether by a direct withdrawal, or indirectly, under pretence of a division of interest and profits.<sup>3</sup> And special statutes are to be found respecting the insolvency of a limited partnership, and the preference among creditors.<sup>4</sup> The prescribed penalty for a disregard of the statute regulations is, for the most part, that the special partner shall be held liable as a general partner; but whether he ought or can be made to suffer, whenever the fault was that of the general partner alone, and he neither knew nor consented to the act of disobedience, is quite another thing. The limited partnership statutes, being exceptional in their nature, cannot, at all events, be enlarged by construction; and it is safe to presume that in all things where the partnership liability is not distinctly limited, the business combination is that of ordinary partners, and the mutual rights and liabilities are to be adjusted accordingly.<sup>5</sup>

§ 200. *Limited Partnership; Dissolution and its Consequences.* — A limited partnership is dissolved in the usual manner: by effluxion of time, death of a partner, judicial

75; Pars. Partn. §§ 426, 427; *Schulten v. Lord*, 4 E. D. Smith, 206; *Capp v. Lacey*, 35 Conn. 463.

<sup>1</sup> *Madison County Bank v. Gould*, 5 Hill, 309; *Jonau v. Blanchard*, 2 Rob. La. 513. He should not represent himself as a general partner. *Barrows v. Downs*, 9 R. I. 446.

<sup>2</sup> *Columbia Land Co. v. Daly*, 46 Kans. 504.

<sup>3</sup> *Singer v. Kelly*, 44 Penn. St. 155. See Pars. Partn. §§ 426, 427.

<sup>4</sup> See *Artisans' Bank v. Treadwell*,

34 Barb. 553; Mass. Pub. Sts. (1882) c. 75. A special partner cannot as such become party to a transfer of all the firm assets to one creditor for the benefit of the rest, under Massachusetts Statutes. *Farnsworth v. Boardman*, 131 Mass. 115. But it is held that all should join in an assignment for creditors generally. 41 Minn. 430.

<sup>5</sup> See *Lachaise v. Marks*, 4 E. D. Smith, 610; *Singer v. Kelly*, 44 Penn. St. 145; Mass. Pub. Sts. (1882) c. 75.

decree, or otherwise, according to the legal methods indicated in the last chapter. But no dissolution is effectual, according to the policy of our legislation, where the parties to the limited partnership voluntarily put an end to it before the time specified in their published certificate, unless public notice is given, by registry and advertisement, after the method of the original certificate. No such formality is requisite, when the time limited in the original certificate has expired, nor in general where the partnership is terminated by act of the law; though in case of dissolution by death or bankruptcy it would certainly be safer to give the notice. And these formalities having been complied with, a special partner has no further responsibility save that connected with a winding-up of the concerns, unless indeed by his conduct he has lent himself substantially to a new partnership combination after the old one has expired.<sup>1</sup>

§ 201. **Joint-Stock Companies; Nature and Origin; English Statutes.** — II. Personal property may also be invested for business purposes by means of that combination known as a "joint-stock company." Joint-stock companies are not very common in this country, since our policy largely favors, as the offset of an ordinary trading partnership, limited partnerships and corporations, the latter being under special or general statute, as the case may be. But in England, where it is difficult and expensive to procure an act or charter of incorporation from the government, and where the limited partnership system has not yet gained a foothold, those who wish to unite for business purposes, securing the co-operation of a larger number of individuals than can safely or conveniently combine as ordinary partners, with, if possible, a diminished personal responsibility for the common debts, bring their capital together into that rather clumsy concern known as a joint-stock company, — an organization which is in the

<sup>1</sup> See Mass. Pub. Sts. (1882) c. 75; Pars. Partn. § 428; Haggerty v. Taylor, 10 Paige, 261; Ames v. Downing, 1 Brad. 321. Statute requirements as to public certificate, &c., of dissolution must be strictly complied with. 5 Biss. 110. As to a renewal, see 120 N. Y. 381; 109 Penn. St. 372. An increase in the amount of capital makes the partnership a new one. 64 Md. 465.

main a partnership *sui generis*, though subject to peculiar statutes, and in its methods of executive management not unlike a corporation.<sup>1</sup> The English statutes on this subject are quite numerous; the most important being, however, what is called "The Companies Act of 1862," an act designed to consolidate the entire law of joint-stock companies and to regulate their constitution, government, and winding up.<sup>2</sup> The principle of limited liability is to some extent recognized by this act; and the English policy is now to require every company, association, or partnership, consisting of more than ten persons, which is formed for the purposes of banking, or of more than twenty persons for "carrying on any other business that has for its object the acquisition of gain," to be incorporated under the Companies Act.<sup>3</sup>

§ 202. **Joint-Stock Companies; The Subject continued.**— Unlike a partnership, the joint-stock company is managed by a few chosen individuals whose powers and functions resemble those of corporation directors; while the shareholders at large appoint these managing officers and hold them accountable. Such is the general tenor of legislation on this subject; yet if there be no statutory provisions regulating the subject, the majority of the shareholders of the

<sup>1</sup> Joint-stock companies, under our American aspect, though authorized by statute, are in effect (limited) partnerships and not corporations; there is no intermediate class. Such a company cannot sue as a corporation. 38 Fed. 574; *Davison v. Holden*, 55 Conn. 103; 140 Mass. 346; 48 Ohio St. 513.

<sup>2</sup> See Cox's *Joint-Stock Companies*, 7th ed. 1, 4; 25 & 26 Vict. c. 69; Pars. Partn. § 431. See also English act 1890 on the subject of companies. Registry is a feature under the "Companies Act" of 1880.

<sup>3</sup> *Ib.* The nature and purposes of the "Companies Act" are largely discussed in a recent English case, *Smith v. Anderson*, 15 Ch. D. 247. Here it was held that a certain submarine-telegraph association was not

organized in compliance with the act; that the deed of settlement was not in object such as to authorize the carrying on of business by directors; but rather so as to provide a trust fund, to be managed by trustees. *James, L. J.* (p. 273), commenting upon the words "company, association, or partnership" limiting the business (used in the text above), expresses the opinion that the act was intended to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and might be put to great difficulty and expense, which was a public mischief to be repressed.

company must fundamentally determine how and by whom its affairs shall be conducted.<sup>1</sup> In other respects joint-stock companies imitate corporations, both as to their organization and the methods of conducting their business. They have a common name (though not, apparently, a common seal), and by-laws of their own; and they issue certificates, or scrip, which are to be transferred and registered like certificates of stock. In short, the "English companies acts" are very much like our general statutes relative to corporations; and even where the two systems differ, it is rather because local legislation provides for the one what it has failed to provide for the other.<sup>2</sup> It is probable that in England, under the statutes which regulate this subject, a partner in a joint company which had adopted certain rules would not be liable to third persons acquainted with those rules beyond the limits so defined.<sup>3</sup> But in this country joint-stock companies must assimilate more closely to the ordinary partnership; and such companies cannot ordinarily be supposed capable of taking to themselves the privileges of a diminished personal liability, any more than those who associate together for the purposes of a general partnership. It is the law-making power which must grant immunities of the kind. This we assert as founded upon reason and principle, even if precedents are wanting.<sup>4</sup>

§ 203. **Joint-Stock Company and Partnership compared as to Dissolution.**—There is, however, one decided advantage

<sup>1</sup> 1 Lind. Partn. 556 *et seq.* See *Dow v. Moore*, 47 N. H. 419; 118 Penn. St. 356; 48 Ohio St. 513.

<sup>2</sup> See *ib.*; Pars. Partn. § 432; *Regina v. Registrar*, 10 Q. B. 839; *Wordsw. Joint-Stock Companies*, c. 1; *Lethbridge v. Adams*, L. R. 13 Eq. 547.

<sup>3</sup> *Blundell v. Winsor*, 8 Sim. 601; *Walburn v. Ingilby*, 1 Myl. & K. 51.

<sup>4</sup> See *Hess v. Werts*, 4 S. & R. 366; *Bright. Fed. Dig. Joint-Stock Company*; Pars. Partn. § 432 *et seq.*

Where joint-stock associates fail to become properly and legally con-

stituted as a company from some informality or the want of legislative sanction, they constitute general partnerships. See Pars. Partn. § 431; *Whipple v. Parker*, 29 Mich. 370; *Manning v. Gasharie*, 27 Ind. 399; *National Bank v. Landon*, 45 N. Y. 419; *Taft v. Ward*, 106 Mass. 518; *Logan v. McNaugher*, 88 Penn. St. 103. See 111 Mass. 45, 518. But as to an organized corporation, while merely in its inchoate state, cf. 119 Mass. 476. A joint-stock company has been held legal at common law. *Phillips v. Blatchford*, 137 Mass. 510.

which a joint-stock company may be said to have over an ordinary partnership. It is not so readily dissolved at the choice or by the death of a member. For, as it was observed in a recent case: "A joint-stock company is not an agreement between a great many persons that they will be co-partners, but is an agreement between the owners of shares, or the owners of stock, that they or their duly recognized assigns, the owners of the shares for the time being, whoever they may be, shall be and continue an association together, sharing profits and bearing losses."<sup>1</sup> Hence it is that the stock is transmissible and transferable; and even when a shareholder dies, the presumption is that his executors, in their representative capacity, succeed to his full liability as well as his rights.<sup>2</sup> Thus the partnership, if such it be, goes on without the strict choice of personal association which prevails in a partnership proper.

§ 204. **Joint-Stock Company compared with Corporation; American Decision.**—To courts of this country, accustomed to deal with partners and corporations simply, the joint-stock company must present itself as a somewhat anomalous institution. And in the highest tribunal of this land, as lately as 1871, where the question for decision was, whether "an insurance company, incorporated or associated under the laws of any government or State other than one of the United States," could be made to pay a tax, under a Massachusetts statute, for the privilege of conducting its corporate business within the State, the characteristics of an English joint-stock company under its "deed of settlement" or "articles of association" received considerable attention. The tax was held to be lawful; and this, as the court viewed the statute, because the insurance company was, under the laws and policy of the United States, no more and no less than a corporation.<sup>3</sup>

<sup>1</sup> *Baird's Case*, L. R. 5 Ch. 725, 734.

<sup>2</sup> *Ib.* See *Pars. Partn.* § 435, and cases cited. But Mr. Parsons points out several particulars in which the transfer of shares would subject the parties concerned to the law of ordinary partnership.

<sup>3</sup> It was a corporation, because it had (1st) a distinctive artificial name by which it could make contracts; (2d) a statutory authority to sue and be sued in the name of its officers as representing the association, though not in the artificial name; (3d) a statutory recognition of the



In truth a joint-stock company may readily resemble a corporation in one phase, and a partnership in another; and partaking more or less, as may happen, of the incidents of either of those two distinct relations, American law refuses to recognize it as a separate and independent relation.

§ 205. *Part-Ownership in Ships or Vessels; Its Nature.*—

III. Before passing to the subject of corporations, we may properly notice the peculiar manner in which a ship or vessel is owned. A chattel so costly, exposed to so many risks, and requiring such expensive repairs, necessarily requires two or more persons, in most instances, to join in its purchase; and those who own a ship together hold it neither as joint or common owners, nor as partners, but as part-owners, a species of relation peculiar to the property. And the rights and duties of part-owners, whether among themselves or as to third persons, are to be determined by the law of shipping, which is founded on commercial usage, and may be considered older, when viewed from our standpoint, than the law of partnership itself. Such persons are, in general, found to be tenants in common as to the ship, but copartners concerning the maritime enterprise in which the ship engages.<sup>1</sup> Let us consider, then, the nature of this interest of

association as an entity distinct from its members, by allowing it to sue the shareholders and be sued by them; (4th) a provision for perpetual succession by transfers of its shares, so that new members are introduced in place of those who die or sell out. Nor did the court deem that the association was any the less a corporation because its members were liable individually for the debts of the company; since the principle of personal liability is applied by express statute to no small proportion of the corporations of this country. *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, *per* Miller, J. Mr. Justice Bradley dissented from these views.

In California there is a species of qualified partnership, known as a

mining partnership, and recognized in numerous instances where persons associate for the purpose of working a mine together and dividing, but not for trading together on its products. Combinations of this character unite some of the incidents of ordinary partnerships with those of tenancies in common. *Settembre v. Putnam*, 30 Cal. 490. Such partnerships, where there are no partnership articles, are subject to the ordinary law of partnership, except for differences sanctioned by local usage; the only general difference being that in such partnerships there is no *delectus personarum*. 42 Cal. 180, 367. And see *Quinn v. Quinn*, 81 Cal. 314; *Bissell v. Foss*, 114 U. S. 252; 102 U. S. 641; 129 U. S. 512.

<sup>1</sup> See *supra*, c. 8; Abb. Shipping,

part-owners, *first* with relation to one another, and *second* with relation to third persons.

§ 206. **Part-Owners, with Relation to one another; General Principle of Ownership.** — *First*, as to part-owners of ships with relation to one another. We have seen that mere tenants in common of chattels exercise little control over the common property, and fail to possess certain powers and rights essential to the conduct of business with it as capital; that owners in severalty must form a partnership, if they wish to go into active business with their respective means. Now, as to ships, “which are built to plough the sea, and not to lie by the walls,” commercial nations find that it is beneficial to government no less than the individual to keep them in active employment; and hence they long since contrived a system which should meet the case. As to the vessel, therefore, the owners are tenants in common, each having a distinct though an undivided interest; and thus do they stand towards one another. The different part-owners may have acquired their respective interests in different ways: they may have built it together at their common expense, or they may have purchased it together; or one or more of the part-owners may have purchased his share from a former whole or part owner. But however acquired, the parties, in the absence of positive stipulations to the contrary, hold the property as “part-owners;” in the present aspect, like tenants in common, and not, of course, as joint-tenants.<sup>1</sup> And if property is given to two or more as owners of a ship, it belongs to them as tenants in common, and not as partners; nor would the principle of survivorship apply.<sup>2</sup>

But while part-owners are not necessarily partners, it is well established that they may be partners; that is to say, that persons united in a general partnership may own a ship, or some interest in a ship, as part of the partnership prop-

Perk. ed. 98; Pars. Partn. 3d ed. c. 19; Bright. Fed. Dig. 782.

<sup>1</sup> *Ib.*; Story Partn. § 417; 3 Kent Com. 151; Mitchell v. Chambers, 43 Mich. 150; Mumford v. Nicoll, 20 Johns. 611; Merrill v. Bartlett, 6

Pick. 46. The cases are quite numerous.

<sup>2</sup> Thorndike v. De Wolf, 6 Pick. 120; Harding v. Foxcroft, 6 Greenl. 78.

erty.<sup>1</sup> And, more than this, part-owners of a ship, who own nothing else in common, may agree to become partners of that ship.<sup>2</sup> Whether a person is to be considered a partner or a part-owner must depend upon the special circumstances of each case; but the usual relation of those owning ships and vessels is that of part-owners, and not partners; and such is the strong presumption whenever a controversy arises, since the partnership relation applied to such property would present some decided disadvantages with scarcely a mutual advantage to balance them.<sup>3</sup>

The ownership of a vessel may be proved in the same manner as that of any other chattel, in the absence of controlling statutes to the contrary. But registry laws are an important feature of our commercial system; and the names and respective shares of part-owners ought, under our latest statutes, to appear inserted in the register. Where this is not done, and no distinct shares are otherwise clearly shown, the parties would be presumed, as in the case of a partnership, to be equal owners of the property.<sup>4</sup>

When those interested in a ship or vessel are part-owners, holding the property after the manner of tenants or owners in common, their rights and duties correspond to the nature of their interest. Thus, if one dies, his share goes to his representatives, and not to the surviving part-owners, as would have been the case in a joint-tenancy.<sup>5</sup>

<sup>1</sup> Abb. Shipping, Perk. ed. 98; *Mumford v. Nicoll*, 20 Johns. 611; *Patterson v. Chalmers*, 7 B. Monr. 497. See *Merritt v. Walsh*, 32 N. Y. 685.

<sup>2</sup> *Ib.*; *Harding v. Foxcroft*, 6 Greenl. 77; *Thorndike v. De Wolf*, 6 Pick. 120.

<sup>3</sup> *Holderness v. Shackels*, 8 B. & C. 612; 3 Kent Com. 154.

<sup>4</sup> Bright. Fed. Dig. 780; Pars. Partn. 552; 9 U. S. Stats. at Large, 441; *Alexander v. Dowie*, 1 H. & N. 152; Abb. Shipping, 97, 98; 1 Pars. Shipping (1869), 90. See *Moore v. Simonds*, 100 U. S. Supr. 145; 5 Saw-

yer C. C. 83; *Bowen v. Warren*, 71 Me. 470.

See U. S. Revised Statutes, §§ 4192, 4193, invalidating bills of sale, mortgages, &c., of United States vessels, unless recorded, construed in *Moore v. Simonds*, 100 U. S. Supr. 145, not to make an unrecorded mortgage invalid as against the parties, and such as have actual notice thereof. And see chapter *post*, as to Ships and Vessels; 5 Sawyer C. C. 83.

<sup>5</sup> See Abb. Shipping, 97, 100, Perkins's *n.*; Pars. Shipping, 90; *Rex v. Collector*, 2 M. & S. 223; *Bulkley v. Barber*, 6 Ex. 164.

§ 207. *The Subject continued; Right to dispose of Vessel. —*

No part-owner can sell more than his own interest in the ship, unless specially authorized to act as agent for another part-owner.<sup>1</sup> But, if the owners of a ship or vessel choose to make themselves partners therein, their powers and duties will be determined by the rules of partnership; in which case one partner may sell or mortgage the entire interest of the firm in the property, and exercise the *jus disponendi* after the usual manner of partners.<sup>2</sup> And yet, as a partner cannot introduce a new person into the firm without the assent of his copartners, he stands at a disadvantage when compared with the part-owner; for the latter may transfer his own undivided interest in the ship so as to give to the transferee all the rights and powers which he possessed, together with his share in the property.<sup>3</sup>

While a part-owner, on the principle of a tenancy or ownership in common of chattels, can sell only his own undivided interest, those of his co-owners whose shares he has sold may subsequently ratify the sale, in which case it becomes in effect their own sale, since the doctrines of agency would thus apply.<sup>4</sup> But the rule appears to be (although there is some doubt as to what will authorize one owner in common to sue his co-owner) that if a part-owner sells the whole vessel as his own, the sale, when carried into effect, is such a constructive destruction of the property of the other owners as to amount to conversion, and so enable them to maintain trover against him, or against the purchaser who sells the ship again as his own.<sup>5</sup> This action of trover would not lie against a part-owner for merely dispossessing his co-owner.<sup>6</sup> Nor can one part-owner maintain replevin against another; nor perhaps sue in trespass for the sale of the whole.<sup>7</sup> In

<sup>1</sup> *Ib.*; *Henshaw v. Clark*, 2 Root, 108; 3 Kent Com. 140, 153; *Story Partn.* § 417. As to the effect of a sale by a master and part-owner, see § 214, *post*; 11 Phila. 273.

<sup>2</sup> *Patch v. Wheatland*, 8 Allen, 102; *Milton v. Mosher*, 7 Met. 244.

<sup>3</sup> See *Oviatt v. Sage*, 7 Conn. 95.

<sup>4</sup> *Putnam v. Wise*, 1 Hill, 234.

<sup>5</sup> *Weld v. Oliver*, 21 Pick. 559; *Hyde v. Stone*, 7 Wend. 354; *White v. Osborn*, 21 Wend. 72; *Farrar v. Beswick*, 1 M. & W. 682.

<sup>6</sup> *Hyde v. Stone*, 9 Cow. 230; *Hurd v. Darling*, 14 Vt. 214.

<sup>7</sup> *Barnes v. Bartlett*, 15 Pick. 71; *Furlong v. Bartlett*, 21 Pick. 401. See 1 *Para. Shipping*, 93, 94.

all these respects, the usual rules of a common ownership of chattels apply.

§ 208. **The Same Subject; Employment of the Ship or Vessel.** — When we come to the employment of the ship or vessel to the enterprises in which it engages, we find an enlargement of the mutual rights and duties of co-owners; for those who own the ship as part-owners, and load and send it out on an adventure in the cost and profit and control of which they are to share, are *quasi* partners as to this particular voyage and adventure.<sup>1</sup> The common law of England provides amply for an emergency, by allowing the majority in value of the ship to employ it at their pleasure, "upon any probable design," while taking care to secure the interest of the dissenting minority from being lost in an employment of which they disapprove. Where a dispute arises, the court of admiralty will, on application of the dissenting owners, take a stipulation from the majority for the safe return of the vessel; and the dissenting owners, in such a case, bear no part of the expenses of the outfit and take no share in the profits of the enterprise, but the ship sails wholly at the risk and for the profit of the others.<sup>2</sup> If legal proceedings for this purpose have not been seasonably taken before the voyage has commenced, the dissenting owners should expressly notify the others interested of their dissent, and carry the principle of this remedy as far as possible and with all expedition; for it has been decided that one part-owner cannot sue a co-owner at law for fraudulently and deceitfully sending the vessel to foreign parts, whereby she was lost; nor in equity for the loss of the ship sent without his consent.<sup>3</sup> If a part-owner expressly notify his dissent, chancery will not compel him to contribute to a loss.<sup>4</sup> And though in a case of equal ownership, a court of admiralty may be reluctant to interfere, yet where the equal owners differ in the ship's management, the

<sup>1</sup> *Doddington v. Hallett*, 1 Ves. Sen. 497; 1 Pars. Shipping, 91.

<sup>2</sup> *The Apollo*, 1 Hagg. 311; Abb. Shipping, 100 *et seq.*; Bright. Fed. Dig. 783; *The Orleans v. Phœbus*, 11 Pet. 175.

<sup>3</sup> 1 Lev. 29; *Strelly v. Winson*, 1 Vern. 297; *Skinns*. 230. See *Horn v. Gilpin*, Ambl. 255.

<sup>4</sup> *Horn v. Gilpin*, *supra*.

court will direct what shall be done.<sup>1</sup> But a part-owner cannot allow repairs of permanent value to be made to a ship, and then, arresting the ship, avoid payment of his proportion of the expense on the plea that he dissents from the proposed employment.<sup>2</sup> On the other hand, while it is said that the control of the majority of a ship extends to putting on board or removing officers or masters at pleasure, it is by no means clear that this majority could remove a master who was likewise a part-owner; though, if dispossessed, the master could only sue for damages, the amount of which might greatly depend upon the justification for his removal.<sup>3</sup>

Where the other part-owners are absent, and no prohibition on their part has been interposed, it may fairly be presumed that the part-owner present can represent them in the supply or management of the vessel and bind them accordingly; though this privilege would not be carried, probably, to the extent of binding absent owners by acts unnecessary, unreasonable, and plainly injurious to their interests.<sup>4</sup>

§ 209. **Adjustment of Controversies; Lien on each other's Shares, etc.** — Whether the court of admiralty has power to compel an obstinate part-owner to sell his interest is not settled by the authorities. The rule of the maritime law in Continental Europe is that a sale may be judicially ordered, as a summary method of bringing quarrels to an end over the ship's employment; and Judge Story and others contend for the lawful exercise by our courts of the same power.<sup>5</sup> Yet some cases deny that any such authority exists.<sup>6</sup>

<sup>1</sup> See Bright. Fed. Dig. 783; *The Ocean*, 1 Spr. 535.

<sup>2</sup> *Davis v. Johnston*, 4 Sim. 539.

<sup>3</sup> See Pars. Shipping, 95-97; *The New Draper*, 4 Rob. Adm. 287; *Montgomery v. Wharton*, 1 Dall. 49. Rule changed by recent Act of Congress, April 9, 1872, c. 90.

<sup>4</sup> 1 Pars. Shipping, 97, criticising *Abb. Shipping*, 105; *Stedman v. Feidler*, 20 N. Y. 437; *Brodie v. Howard*, 17 C. B. 109. The law of agency has its own familiar limitations as to the scope of employment in which one

may be said to represent another. See *Bowen v. Peters*, 71 Me. 463. For the English doctrine see *Frazer v. Cuthbertson*, 6 Q. B. D. 93.

<sup>5</sup> 3 Kent Com. 153, 154; *Willings v. Blight*, 2 Pet. Adm. 288; *Story Partn.* § 438; 2 Pars. Shipping, 343. The admiralty jurisdiction of the United States courts has been recently enlarged. Where interests are equal and the conflict decided, it seems that a sale may be ordered. 10 Ben. 110; 7 Sawyer, 360.

<sup>6</sup> *Ouston v. Hebden*, 1 Wills. 101;

By the technical rule of the common law, part-owners are not liable to each other for negligence whereby the common property is lost or injured; for the reason that each co-tenant may and ought to protect himself. But admiralty might fairly refuse to accept so narrow a doctrine.<sup>1</sup>

Much controversy has arisen over the question whether part-owners have, under some circumstances, a lien on each other's share of a ship, as partners in trade would have in the common merchandise. The result of the decisions would seem to be that no such lien exists where the ship belongs to persons as part-owners strictly, and not as partners.<sup>2</sup> Yet if an adventure be undertaken by mutual consent, and one of the part-owners become a bankrupt after the commencement of the voyage, not having paid his full share of the outfit, the other partners have a right to deduct from his share of the profit whatever remains charged to him on account of the outfit, and pay over the balance only to the assignees.<sup>3</sup> It is when we attempt to extend this right of deduction to a further or general indebtedness, that we are beset with doubts; for not only may persons own a ship as partners rather than part-owners, but they may be part-owners of the ship and partners in the particular adventure; or, if the enterprise be to sell vessel and cargo abroad, instead of freighting and chartering the vessel to carry a cargo and return, it might be said that the part-owners had made themselves partners in both ship and cargo, the total proceeds comprising the fruits of the voyage.<sup>4</sup> It must be admitted that the cases are quite conflicting as to the gen-

*Davis v. Brig Seneca*, Gilp. 10. See *Abb. Shipping*, 104; 5 *Dillon*, 159. It is preferable, where justice permits of the arrangement, and interests are unequal, that the majority owners who desire to use the vessel be required to give security to the dissenting owners, rather than that a sale be ordered. 5 *Dillon*, 159; 7 *Sawyer*, 360.

<sup>1</sup> See 1 *Pars. Shipping*, 107.

<sup>2</sup> 1 *Pars. Shipping*, 107, 108, and *n.*; *The Larch*, 2 *Curt. C. C.* 427; *Ex parte Young*, 2 *Ves. & B.* 242; *Merrill v. Bartlett*, 6 *Pick.* 46.

<sup>3</sup> *Holderness v. Shackels*, 8 *B. & C.* 612; *Abb. Shipping*, 108; 1 *Pars. Shipping*, 107.

<sup>4</sup> See *Mumford v. Nicoll*, 20 *Johns.* 611; *Cowp.* 469; *Hewitt v. Sturdevant*, 4 *B. Monr.* 458; *Doddington v. Hallett*, 1 *Ves. Sen.* 497; *Abb. Shipping*, *n.* by *Perkins*, 111.

eral liens of part-owners, while there are doubtless instances in which, if a part-owner obtained the proceeds after making advances for the voyage, it would be unjust to make him pay over without allowing him to keep enough in his hands for his proper reimbursement.<sup>1</sup>

If a ship be owned by partners, no one, on the principles of partnership, can make a claim upon the others for the expenses he has properly incurred, except by having the partnership accounts completely made up and adjusted. But where all are part-owners, he may sue each of the others for his share of the expense, provided only the repairs were made or the outlay incurred with the express or implied consent of his co-owner.<sup>2</sup> For a full adjustment of accounts the custom has been for part-owners to bring a bill in equity, just as members of a partnership would do; and in England courts of admiralty may now take jurisdiction for the same purpose; yet as legislation is necessary to give admiralty courts power over matters of account between part-owners, those of the United States have no such jurisdiction.<sup>3</sup>

§ 210. *Miscellaneous Points as to Rights of Part-Owners inter Se.* — Since, as we have seen, one part-owner, as such, has no power over the shares of the other part-owners, it follows that he can no more mortgage or pledge the whole ship than sell it outright.<sup>4</sup> He cannot even insure the interests of his co-owners except as their authorized agent.<sup>5</sup> And, in fine, part-owners are held to honesty and fairness in their mutual dealings; and if one attempts to obtain advantages to himself by violating the rights of the others, and seeks to exercise undue control over the common interests, he will find that justice “beareth not the sword in vain.”<sup>6</sup>

<sup>1</sup> See 1 Pars. Shipping, 116; Story Partn. §§ 441, 443; Bright. Fed. Dig. 783.

<sup>2</sup> Pars. Partn. 553-555, and cases cited; *Patterson v. Chalmers*, 7 B. Monr. 596; *Sawyer v. Freeman*, 35 Me. 542; *Gowan v. Foster*, 3 B. & Ad. 507.

<sup>3</sup> *Moffat v. Farquharson*, 2 Br. C. C. 338; 1 Pars. Shipping, 116; *The Apollo*, 1 Hagg. Adm. 306; 24 Vict.

c. 10, § 8; *Ward v. Thompson*, 22 How. 330. State jurisdiction in equity of such matters of account has been asserted. 12 Phila. 392.

<sup>4</sup> Pars. Partn. 556; *supra*; § 207.

<sup>5</sup> *Abb. Shipping*, 107; *Hooper v. Lusby*, 4 Campb. 66; *Peoria, &c. Ins. Co. v. Hall*, 12 Mich. 202.

<sup>6</sup> See *Card v. Hope*, 2 B. & C. 661; 1 Pars. Shipping, 124.



§ 211. **Ship-Owners with Relation to Third Persons; Form of Actions, etc.** — *Secondly*, as to the interest of part-owners with relation to third persons or the public. The several part-owners of a ship make in law but one owner; and in case an injury is done to the ship by a stranger, they ought to join in an action for damages; though, as this rule is for the convenience of the wrong-doer, he ought to plead the non-joinder in abatement, in order to take advantage of it.<sup>1</sup> Where, however, the action is for the freight of goods conveyed, or on any contract, the defendant may avail himself of the non-joinder by evidence at the trial.<sup>2</sup>

On the other hand, if an action is brought against the part-owners upon any contract relating to the ship, although the action should be brought against all jointly, yet the non-joinder of one or more can only be pleaded by the defendants in abatement.<sup>3</sup> But in respect of torts committed by several, it is now settled that all, or a part only, of the wrong-doers may be sued; and this holds good as to the wrongful acts of part-owners.<sup>4</sup> Where persons are joined in a suit, who did not contract, or were not contracted with, this misjoinder may be shown on the general issue; for it is a variance in substance.<sup>5</sup> And, again, whenever an action which should have been brought against all is brought against some of the part-owners only, and they satisfy the judgment recovered, they can sue the others and make them contribute.<sup>6</sup> Some of the United States, in the exercise of a local jurisdiction, allow actions to be brought against a vessel by its name, if the cause of action did not arise elsewhere.<sup>7</sup>

§ 212. **Part-Owners with Relation to Third Persons; Liability for Supplies, etc.** — So much for matters of form. Concerning the liability of part-owners for necessary repairs or

<sup>1</sup> See 7 T. R. 279; Abb. Shipping, 114; 1 Pars. Shipping, 116; Wheelwright v. Depeyster, 1 Johns. 472; Patten v. Gurney, 17 Mass. 182.

<sup>2</sup> Abb. 115; 1 Pars. 117; Baker v. Jewell, 6 Mass. 460.

<sup>3</sup> Abb. 116; Robertson v. Smith, 18 Johns. 459; Bowen v. Stoddard, 10 Met. 375.

<sup>4</sup> 5 T. R. 649; Low v. Mumford, 14 Johns. 426; Patten v. Gurney, 17 Mass. 182.

<sup>5</sup> 6 T. R. 363; Tom v. Goodrich, 2 Johns. 213; Livingston v. Tremper, 11 Johns. 101.

<sup>6</sup> 1 Pars. Shipping, 119.

<sup>7</sup> See 1 Pars. Shipping, 119-121, and n.

supplies, the general rule is that all are liable *in solido*, provided the repairs were actually made or the supplies furnished; not only because the advantage enures to the ship, but in order that, wherever the ship goes, there may be a credit for what is needful.<sup>1</sup> In this respect the English law goes beyond that of Holland and some other countries, which only charges the several part-owners according to their respective interests.<sup>2</sup> The limitation of our own rule is obvious, — namely, that the repairs or supplies were necessary and reasonable; though the principle of necessity is not grudgingly applied in the courts.<sup>3</sup> But they who were once owners are not liable after they have sold the vessel, although neither the master nor the person furnishing supplies knew of the previous sale; for these are owners no longer.<sup>4</sup>

A distinction is sometimes made between a home port and a foreign port, with reference to the exercise by one of the power to bind all by contracts for repairs or supplies. The argument is, that a ship far from home might perish for want of aid which was delayed until the master or co-owner could consult the others interested in the vessel; while at home, all who will have to pay might and ought to be consulted. But the question is still open, whether all are liable when the expenses are incurred at the home port; though it would be better for the part-owner giving the order to obtain specific authority from the other part-owners.<sup>5</sup> Certainly, wherever the ship may be, the person who repairs or supplies a ship with what is totally and plainly unnecessary has no claim upon those part-owners who did not order them.<sup>6</sup>

<sup>1</sup> 7 T. R. 306; Wright v. Hunter, 1 East, 20; Chapman v. Durant, 10 Mass. 47; 1 Pars. Shipping, 100 *et seq.*

<sup>2</sup> Abb. Shipping, 117.

<sup>3</sup> *Ib.*; Webster v. Seekamp, 4 B. & Ald. 352; Merwin v. Shaller, 16 Conn. 489; Beldon v. Campbell, 6 Ex. 886.

<sup>4</sup> Dame v. Hadlock, 4 Pick. 458. Nor, *seemingly*, a registered owner holding as security. See Brightly Fed. Dig. Suppl. 168. Part-ownership is

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*prima facie* evidence of liability for necessary repairs or supplies. Bowen v. Peters, 71 Me. 463, 469. One should make known his dissent or disapprobation in advance if he wishes to escape responsibility. Brodie v. Howard, 17 C. B. 109.

<sup>5</sup> Benson v. Thompson, 27 Me. 470; Mitcheson v. Oliver, 5 E. & B. 419.

<sup>6</sup> 1 Pars. Shipping, 101; Stirling v. Phosphate Co., 35 Md. 128.

Nor, we may add, would he have a lien on the ship under those circumstances; this lien being, after all, the favorite method of securing a claimant's reimbursement, for repairs and supplies, as we shall see hereafter.<sup>1</sup> On the other hand, the part-owners who employ a vessel are presumed to do so for the benefit and at the expense of all part-owners who have expressed no dissent and do not seasonably repudiate the idea of such agency with reference to the creditor, and necessary repairs or supplies may be recovered accordingly; even, as some cases hold, though furnished at the home port.<sup>2</sup>

In a clear case where especial credit is given to one only of several part-owners, — meaning by this not only that the other part-owners were unknown, but that they were not designed to be charged, whether afterwards found out or not, — the other part-owners are not liable.<sup>3</sup> But where the creditor charges the only owner he knows, or even where the party ordering the repairs or supplies gives his negotiable paper which the creditor accepts, this does not necessarily relieve the other part-owners from liability. A creditor who accepts a note from one indebted may be presumed, it is true, to have taken it in satisfaction of the debt; yet the presumption is one of fact only, and may be rebutted.<sup>4</sup> And if the claimant for repairs or supplies receive a part of his claim from one or more of those liable *in solido*, they who thus pay part, even if it be more than their share, are still liable for the balance, unless they have protected themselves by a sufficient discharge of the claim.<sup>5</sup> Credit given to the ship may bind the ship, though a part-owner be not personally bound.

An exception to this rule is made in favor of insurers who have had the ownership of the vessel thrown upon them by

<sup>1</sup> *Ib.* See *The Lulu*, 10 Wall. 192.

<sup>2</sup> *Bowen v. Peters*, 71 Me. 463, and cases cited. But cf. *Frazer v. Cuthbertson*, 6 Q. B. D. 93.

<sup>3</sup> *Thomson v. Davenport*, 9 B. & C. 78; *Miln v. Spinola*, 4 Hill, 177; *Scottin v. Stanley*, 1 Dall. 129; 1 Pars. 102-104.

<sup>4</sup> See *Hudson v. Bradley*, 2 Cliff. 130; *The Kimball*, 3 Wall. 37. The rule in Maine and Massachusetts may be otherwise. See 1 Pars. Shipping, 104. See also *Newell v. Nixon*, 4 Wall. 572; 47 Mich. 408.

<sup>5</sup> 1 Pars. Shipping, 102; *Abb. Shipping*, 116; *Fitch v. Sutton*, 5 East, 230.

an abandonment. These, out of regard to their misfortune, are considered liable not *in solido*, but proportionally; each insurer, in absence of a special promise, being liable to the extent of his own interest, and no farther.<sup>1</sup>

In case a ship is mortgaged, the party who has actual and visible possession and control of the vessel is commonly treated as owner for the time and purpose, so as to become liable for repairs and supplies; and a like principle would be applied to charterers. The question who has the benefit of the repair and supplies is important to an issue of this sort; also the inquiry to whom and on whose credit they were given.<sup>2</sup>

§ 213. **Liability of Part-Owners to Others for one another's Torts.**—The liability of part-owners for the torts of their servants or of one another depends upon the usual principles of agency; and while for a wrongful act arising in the scope of usual employment, and extending to mere negligence in the performance, all the part-owners could be made to suffer as principals, it is not to be supposed that a wanton and malicious injury deliberately and intentionally committed in or about the ship, outside the scope of employment, could render any liable for the consequences except those who participated personally in the act, or gave express orders to have it done,<sup>3</sup> or, under the usual rules of agency, contributed to the injury.<sup>4</sup>

§ 214. **Managing Owner, or Ship's Husband.**—There is usually some person selected on behalf of the part-owners to act as their general managing agent, in the concerns of the ship or vessel. He is known as the "ship's husband" in the older books, and is generally one of the owners, for which reason

<sup>1</sup> United Ins. Co. v. Scott, 1 Johns. 106.

<sup>2</sup> Miln v. Spinola, 4 Hill, 177; Hodgson v. Butts, 3 Cr. 140; Pars. Partn. 571. But see Myers v. Willis, 18 C. B. 886.

<sup>3</sup> The Tribune, 3 Hagg. 114; The Dundee, 1 Hagg. 109; Turnpike Co. v. Vanderbilt, 2 Comst. 479; McMahon v. Davidson, 12 Minn. 357;

1 Pars. Shipping, 106, 107; *Somes v. White*, 65 Me. 542.

<sup>4</sup> So as to damages sustained where both parties concerned in the injury knew that the vessel was being used outside the scope of permitted employment. 9 Ben. 352. See 3 Woods, C. C. 377; Hill Man. Co. v. Providence Steamship Co., 113 Mass. 495.

our registration statutes usually speak of him as the managing owner. His powers and duties may be regulated by some special agreement; but the appointment is frequently to be inferred from the exercise of duties appropriate to this office with the knowledge and consent of the owners; and usage determines his conduct in the main.<sup>1</sup> He is to see that the ship is seaworthy; to have it properly equipped and manned for its voyages; to take care of it in port; to procure freights or charter-parties; to keep the ship's papers; to make up the accounts, disburse and receive moneys; and otherwise to assume the active management of the common concerns. His acts for these purposes are to be deemed the acts of all the part-owners, who are liable for all contracts he makes for the ship's employment, unless the creditor dealt with him on his sole credit.<sup>2</sup> And the ship's husband ought to obtain from each part-owner his share or contribution to the expense of outfit, repairs, and other necessities. If he advances the proportional share of a part-owner, he may sue him for it; and if he be himself a part-owner, he has a lien on the produce of the voyage for his disbursements; though whether, as ship's husband, the law gives him a lien, is quite doubtful, however fairly he might have earned the right.<sup>3</sup> But as a mere stranger, he may hold the proceeds of a voyage, or of the ship itself, if sold, or its documents, by way of securing indemnity. The ship's husband cannot, without special authority by contract or clear usage, borrow money; nor give up the lien for freight; nor insure; nor purchase a cargo for the owners; nor bring suits concerning the ship, though it is frequently found that subsequent rati-

<sup>1</sup> 1 Pars. Shipping, 109-114; Abb. Shipping, 106-108; 3 Kent Com. 157. The owner of a one-half interest who is the master in possession, with a right of possession by mutual agreement as master, is not liable to removal. *Rea v. The Eclipse*, 135 U. S. 599.

<sup>2</sup> *Ib.*; *Reed v. White*, 5 Esp. 122; *Muldon v. Whitlock*, 1 Cow. 290; *Bowen v. Peters*, 71 Me. 463; *Sted-*

*man v. Feidler*, 20 N. Y. 437; *Mitchell v. Chambers*, 43 Mich. 150 and cases cited. The authority of a managing owner extends to the conduct on shore of all that concerns the employment of the ship. *Huntsman, The* [1894], P. 214.

<sup>3</sup> *Ex parte Young*, 2 Ves. & B. 242; *Smith v. De Silva*, Cowp. 469; 3 Kent Com. 155; *Story Partn.* § 443.

fication is as good as a previous authority; nor delegate his office.<sup>1</sup>

Special customs regulate, in certain localities, the proper commissions and allowances of a ship's husband; and commercial usage, in general, will be found to depend somewhat upon the character of the adventure in which the ship is engaged, not only with regard to the powers and duties of the managing agent, but as concerns the part-owners of the ship and those employed in its navigation.<sup>2</sup>

<sup>1</sup> 1 Bell Com. (5th ed.) 504; 1 Pars. Shipping, 110; 3 Kent Com. 157; *Hewett v. Buck*, 17 Me. 147.

<sup>2</sup> As to whaling voyages, for instance, see 1 Pars. Shipping, 30-34. See *Rennell v. Kimball*, 5 Allen, 356.

Custom, general and notorious, is not disregarded with reference to a ship's husband; it may even authorize him in certain classes of cases to insure the vessel for the benefit of the owners without their express direction. *Adams v. Pittsburgh Ins. Co.*, 95 Penn. St. 348.

The master or managing owner may act for himself in obtaining bail for the release of the vessel from seizure under civil process; but not so as to bind the other owners personally. *Mitchell v. Chambers*, 43 Mich. 150, criticizing *Barker v. Highley*, 15 C. B. N. S. 27; *Gager v. Babcock*, 48 N. Y. 154. If a master who is part-owner sells his interest, he cannot so transfer the command as necessarily to bind the other part-owners. 11 Phila. 273. Whether one part-owner, who is master, can be held liable to the other for neglecting to employ the vessel, see *Hyer v. Caro*, 17 Fla. 332. And see 17 Hun, 583.

Master and owner may have a special contract upon various points, such as supplies, freight, &c.; but this does not bind shippers who have no notice of the arrangement and rely upon the general rules. *Oakland Cotton Co. v. Jennings*, 46 Cal. 175. But cf. *Frazer v. Cuthbertson*, 6 Q. B. D. 93, as to supplies. "Language occurs, both in some text-books and in some decided cases, which seems to be based upon the assumption that a managing owner is an owner employed by and on behalf of all his brother owners without exception. But there is no magic in the term managing owner which creates him plenipotentiary for those owners whose agent he is not in fact." *Bowen, J.*, in *Frazer v. Cuthbertson*, 6 Q. B. D. 93, 98. See also remarks as to the question of supplies in *Stedman v. Feidler*, 20 N. Y. 437. The part-owner and manager has no authority to bind the estate of a deceased part-owner for supplies. *Stedman v. Feidler*, ib. As to his right of recompense, see [1891] 1 Ch. 390. As to bail or security taken by the other part-owner from the manager, see 12 P. D. 32, 185.

## CHAPTER XI.

## MEMBERS OF CORPORATIONS.

§ 215. *Corporate Organization ; its Advantages and Disadvantages.* — Personal property is held not only by joint and common owners, by partners, whether engaged in a general or a limited partnership, by shipowners, and by members of joint-stock companies, but also by members or shareholders in a private corporation. It is this last species of combination, bringing together, as it does, the largest aggregate wealth with the smallest possible individual liability, to which our attention will now be directed. In the joint-stock corporation we find the perfection of an organized self-aggrandizement, with the most splendid opportunities for enterprise and princely gains ; yet, if not jealously watched, and checked in its every encroachment upon individual rights, the sure foe, besides, of honest competition in business, the tyrant of legislatures, and the canker of a self-governing people.

Corporations have their analogies in a State, and a corporate combination is usually designated as a sort of fictitious person. A corporation, as the name imports, is a body ; it is a body, created by law, composed of individuals united under a common name, the members of which succeed each other ; so that the body continues the same, notwithstanding the change going on in the individuals who compose it.<sup>1</sup> We may therefore consider that a corporation has certain advantages over the individual for business. Instead of one man's

<sup>1</sup> See *Dartmouth College v. Woodward*, 4 Wheat. 636 ; 2 Kent Com. 215 ; *Ang. & Ames Corp.* § 1. While a corporation is frequently defined in the courts as an "artificial being," a "fictitious person," &c., it is not to be considered as a person or thing

distinct from the corporators who compose it. *Morawetz on Corporations*, § 1, contrasting 4 Wheat. 518, 636, and numerous other cases, with 1 Kyd on Corporations, 13 ; *Railway Co. v. Allerton*, 18 Wall. 233.

brain, wealth, and energy, it unites the brains, wealth, and energy of many. Instead of being confined to operations for the brief and uncertain period of a single human life, it is endowed with immortality ; still with this qualification, that the charter may have limited the term of its existence to a certain period. Instead of being a moral agent, the corporation, as it is said, has no soul and can be guilty of no crime ; though here it should be added that proceedings are now permitted in some States, in the nature of an indictment, where some gross wrong has been committed through the negligence of its managing officers, who, nevertheless, are found in criminal practice very hard to reach. And while partnerships and joint-stock companies are ill-jointed and loose in their management, corporations have compactness and a coercive authority over their members.<sup>1</sup>

§ 216. **Public and Private Corporations; Leading Classes.** — The leading divisions of corporations are those of *public* and *private* corporations. With public corporations, such as cities and towns, we have no present concern ; but private corporations, and those especially which have a capital stock and are organized for business purposes, may properly occupy our attention in the present chapter. The line which divides public and private corporations is not always readily discernible ; but in general, while the legislature has an exclusive control over the former, and may modify or destroy at pleasure, the latter are created by a legislative act which, in connection with its acceptance by the parties interested, is regarded as a compact that cannot, under the terms of our American Constitution, be afterwards modified or annulled. And, besides, a private corporation is distinguishable from municipal bodies in having a corporate fund from which to satisfy judgments, and by the irresponsibility of individual members for corporate debts beyond their amount of interest in the fund.<sup>2</sup> There are ecclesiastical (or religious) and lay

<sup>1</sup> See Ang. & Ames Corp. §§ 1-8, *passim* ; 1 Kyd, 71 ; 2 Bl. Com. 470-472 ; 2 Kent Com. 268 ; Morawetz Corp. § 2.

<sup>2</sup> Merchants' Bank v. Cook, 4 Pick. 414 ; Dartmouth College v. Woodward, 4 Wheat. 636 ; Ang. & Ames Corp. §§ 30-34, and notes.



named among private corporations ; and, again, eleemosynary or charitable (like hospitals) and civil ; which last term applies to both public and private corporations.<sup>1</sup> On the whole, public corporations are generally considered those which exist for public and political purposes only, although they involve in a measure private interests ; while any corporation founded by private beneficence, though chartered by government and created for objects of general welfare, is a private and not a public corporation ; to which latter class belong of course corporate associations (those demanding our present attention), whose main object is business and pecuniary profit.<sup>2</sup>

§ 217. **History and Modern Growth of Corporations.** — In England the law of corporations has been confined chiefly to municipal bodies and to a few chartered monopolies, like the East India Company ; though more lately extended to joint-stock companies under the Companies Acts. But in the United States we have a large number of aggregate corporations, chartered not only for charitable and benevolent objects, but for manufacturing, mechanical, mining, and various other business pursuits. And that monopolies may not too greatly rule or favoritism direct the legislature, the tendency in the various States is now to multiply opportunities for persons to organize for business purposes under general laws ; instead of requiring them to procure special charters of incorporation in every case, as formerly, a course which invites corruption of legislators and clogs healthy competition in trade.<sup>3</sup>

Blackstone, on the authority of Plutarch, ascribes the invention of private corporations to Rome and Numa Pompilius ; while others have thought, with more reason, that it was brought to Rome from the Greeks ; for the laws of Solon

See also *Taylor Corp.* § 450, which questions the *Dartmouth College* case ; *Munn v. Illinois*, 94 U. S. 113.

<sup>1</sup> 1 Bl. Com. 470, 472 ; 2 Kent Com. 268, 269 ; 1 Kyd, 26 ; Ang. & Ames Corp. §§ 38-39 ; Morawetz Corp. § 2.

<sup>2</sup> *Dartmouth College v. Woodward*, 4 Wheat. 636 ; Cowen, J., in *Thomas v. Dakin*, 22 Wend. 109.

<sup>3</sup> 2 Kent Com. 272, and *n.* ; Ang. & Ames, § 64 ; Brightly Dig. "Corporations."

permitted private companies to institute themselves at pleasure, subject only to the public laws.<sup>1</sup> In imperial Rome, the corporation became regarded with much jealousy, and an express decree of the Senate or Emperor was essential to its establishment in all cases; whereby the number was doubtless lessened, while the odious monopoly feature became all the more apparent. The practice of incorporating persons composing particular trades was known to both Roman and Greek law; and in England, as long ago as the reign of Henry II., or even earlier, we find trade charters, older than *Magna Charta* itself. Privileges were thus conferred in Great Britain from the fourteenth century downward, upon the weavers, the mercers, the fishmongers, the vintners, the merchant-tailors, and others.<sup>2</sup> Commercial corporations, too, were known to the Roman Law.<sup>3</sup> And with the revival of commerce in Europe, corporations were found engaged in speculative adventure upon the seas. Banking companies have also claimed and obtained many chartered privileges; not only in Genoa, Venice, and the other once opulent cities of Southern Europe, but in Amsterdam and London; and the example of the Bank of England, which has proved so valuable an ally to the public credit of Great Britain ever since its incorporation in 1694, led to the establishment of a similar chartered institution in this country; but for a time only, since so gigantic a moneyed monopoly could not fail, however useful, to be unpopular in a country where national and State interests foster jealousy. Land companies were organized in the seventeenth century to enable the British Government to develop the vast resources of a newly discovered continent; and several of the early governments of our old thirteen American colonies were in the hands of proprietors whose charters had passed the great seal.<sup>4</sup> In these and other instances we see that the modern policy of government has been to encourage certain business ventures of

<sup>1</sup> 1 Bl. Com. 468; 2 Kent Com. 268, 269; Digest, 47, 22, 4; Taylor Corp. §§ 1-9.

<sup>2</sup> *Ib.*; Ang. & Ames, §§ 52, 53.

<sup>3</sup> Ayliffe, 196.

<sup>4</sup> See Ang. & Ames Corp. §§ 53, 54; 2 Kent Com. 268-271.

public importance requiring extraordinary capital or involving daring risks, by placing in the hands of favored individuals a charter of incorporation which confers upon them exclusive privileges and correspondingly shuts out all competition.

§ 218. **The Same Subject.**—Corporations have been multiplied of late years in this country to a remarkable extent; and that, too, notwithstanding the abuses which are admitted to attend the exercise of exclusive privileges by powerful combinations. The absence of great individual wealth in a community tends to draw men closely together for the accomplishment of needful measures of mutual improvement; and, in order that traffic might be opened as civilization went forward, new inducements to capitalists have been offered in various States or by our American Congress, with each new necessity, in the shape of liberal charters and acts of incorporation. The network of railways, canals, and turnpikes extending across this continent attests lasting advantages which result from this policy; while the later movements of railway kings towards the practical consolidation of their companies, with a rivalry far more crushing than that formerly of small and single corporations, and the reckless tyranny already beginning to manifest itself on the part of jobbers and speculators who hold the reins of corporate power, may well awaken alarm lest this private monopoly system, if not overmastered and kept in restraint, prove, notwithstanding, the ruin of legitimate toil and honest enterprise in a popular government like ours. For, thus, capital and labor become arrayed against one another; corporation money becomes employed for legislative corruption and bribery in order to obtain new privileges or prevent the impairment of old ones; the few grow rich and the many grow poor; till at length either the republic sinks into decay or the remedy involves political revolution and immense temporary disaster.

Banking and insurance business, which cannot safely be transacted without large capital, is in the United States almost entirely absorbed by corporations; and at present we

have a national banking system in full operation, not confined to a single institution, but comprising a large number of banks chartered formally under the local laws. Under any American system the banks are likely to be localized to a great extent for their own business convenience. Corporations for manufacturing and mining purposes are also very common in the United States. There have been occasional attempts to check the rapid increase of corporations; as in the New York Legislature of 1821, when a two thirds vote was made requisite for the passage of each act of incorporation;<sup>1</sup> though nothing seems to be more effectual for suppressing the worst evils of the monopoly system than constitutional provisions, such as many States have already adopted, which interdict or restrain special grants of corporate powers, and permit under general laws in preference all persons to obtain a corporate organization who desire the facility.<sup>2</sup> Legislation sometimes throws special safeguards about its chartered banks; and in many of the Western States we find constitutional restraints imposed upon the State ownership of stock and the loan of State credit in aid of a corporation; while it is quite common and highly prudent for the legislature in these days, when granting an act of incorporation, to limit the term of the grant, and reserve, moreover, the right on the part of the State to alter and amend whenever it shall be thought needful and proper. And, finally, there has been a disposition in some parts of the United States to change essentially the privileges of private

<sup>1</sup> Warner v. Beers, 23 Wend. 103. See a constitutional provision of this character in the fundamental law of Michigan, so construed as to prohibit the legislature from passing a general incorporation law without the assent of two thirds of each house. Green v. Graves, 1 Dougl. 351. Constraints of one kind or another upon corporate legislation (some of them very curious) prevail quite generally at this day in the several State constitutions. See Hough's Constitutions, *passim*.

<sup>2</sup> Morawetz Corp. §§ 6, 536; San Francisco v. Water Works, 48 Cal. 493; Wallace v. Loomis, 97 U. S. 146.

See constitution of Maine providing that when a bill is presented for an act of incorporation, it shall be continued until a succeeding legislature assembles, &c. McClinch v. Sturgis, 72 Me. 288. The charter of a private corporation organized under a general law is as inviolable as that of one organized under a special act. 27 Hun, 483.

corporations, in various instances, by enlarging the personal liabilities of the members or directors.<sup>1</sup>

§ 219. **How Private Corporations are created ; Charter, Legislative Act, etc.** — How, then, is a private corporation to be created ? We have borrowed from the Roman law, and from that policy of municipal corporations which the Roman conquerors long ago extended to Great Britain as well as to the continent of Europe, most of the legal principles relative to the powers and capacities of corporations. No corporation could exist, at the civil law, unless confirmed by sovereign power. The king of England, soon after the Norman Conquest, assumed the exclusive prerogative of granting exclusive privileges of this sort ; and since the time of Bracton the rule has been settled that the king's assent should be given, either by act of Parliament (where the royal assent is a necessary ingredient) or by charter ; and, as the prescriptive royal prerogatives suffer with every new encroachment of Parliament, recourse in that country must now be usually had to special legislation. And special legislation being procured with difficulty and expense, joint-stock companies are favored.<sup>2</sup> In this country the subject is commonly controlled by the State legislatures ; and the authority of this branch of each local government to create corporations with powers which are not repugnant to the constitution of the State, nor to the constitution and laws of the United States, is unquestionable.<sup>3</sup> The federal government, too, though limited in

<sup>1</sup> See Abbott's Digest, Corp. "Constitutions ;" 2 Kent Com. 272, and notes ; Ang. & Ames, § 64. It is submitted by the writer that changes in private corporate organization are desirable in the direction of enlarging the personal liability of the directors, simplifying and defining their powers, and rendering them better subjected to scrutiny and more closely dependent upon the general will of the general stockholders, if not of the public, than hitherto. The adroit and selfish schemes of a ring of managers in a corporation have often proved more

injurious, in our day, to the corporate welfare and the general interests of the public, than would the charter itself, administered as the legislature intended it should be, and for the common interest of the stockholders.

<sup>2</sup> Dig. 47, lib. 22, 23 ; 1 Kyd, 61 ; Ang. & Ames, §§ 67, 68 ; *supra*, § 201.

<sup>3</sup> *M'Culloch v. State of Maryland*, 4 Wheat. 421 ; *Vincennes University v. Indiana*, 14 How. 268 ; *Stowe v. Flagge*, 72 Ill. 401.

The power to charter corporations belongs to each legislature, unless ex-

its powers, is sovereign within its sphere of action ; and, as an appropriate means of exercising any of the powers given by the Constitution to the government of the Union, it may lawfully create a corporation.<sup>1</sup> It is sometimes said that corporations exist by prescription ; but this is nothing more than a presumption that any existing corporation was duly incorporated ; and the case must be rare in this country where a legislative act or charter could not be shown in positive proof.<sup>2</sup>

A corporation is the body or institution itself ; while incorporation is the act by which that institution is created. A charter is properly a sovereign grant ; but in this country the word is used as synonymous rather with the legislative act of incorporation.<sup>3</sup> And a State legislature may pass a general law which authorizes any persons to meet together and form corporations of a certain kind ; or it may grant a special act of incorporation to certain individuals and their successors only. It is the policy of some States, indeed, to discourage special acts of incorporation altogether ; and constitutional prohibitions may be found to that effect, which nevertheless permit the passage of general laws authorizing

pressly taken away by the constitution ; and is incidental to the general power of making laws for the welfare of the State. *Bank of Chenango v. Brown*, 26 N. Y. 467 ; *Morawetz Corp.* § 4. A State legislature cannot incorporate an association for purposes prohibited by the Constitution of the United States ; as, *e.g.*, to promote rebellion. 71 N. C. 111 ; 6 Rich. 243. The old common-law doctrine of the power of delegating the right to grant a private charter has little or no practical application to the constituted governments, State and national, in this country. See *Morawetz*, §§ 7, 8, where the doctrine is stated with its limitations.

<sup>1</sup> *M'Cullough v. Maryland*, 4 Wheat. 316. This is a leading case in point, affirming the right of Congress to charter a national bank ;

contrary to the constitutional interpretation which a political school in this nation had previously insisted upon. This doctrine has been reasserted and extended in recent years ; as, for example, in sustaining our present national banking acts, and the acts incorporating the Pacific railroad companies. The power of granting corporate franchises is not given expressly to Congress by our federal constitution ; but is incident to powers expressly granted. See *Morawetz*, § 5 ; *Thompson v. Pacific R.*, 7 Wall. 566 ; *Farmers', &c. Bank v. Dearing*, 91 U. S. 27 ; 153 U. S. 525.

<sup>2</sup> 2 Kent Com. 277 ; *Dillingham v. Snow*, 3 Mass. 276 ; *Pawlet v. Clark*, 9 Cranch, 292.

<sup>3</sup> *Ang. & Ames*, § 5 ; *Bouvier Dict. "Corporations,"* &c.

the formation of an indefinite number of corporations, in order that corporate privileges may be as free to the public as the right to trade singly or in partnerships.<sup>1</sup> Our State legislatures, in the absence of express constitutional restrictions, exercise large powers in the premises; for they may prescribe the functions and duties of private corporations, control their action, and impose restraints upon them; subject to the qualifications that the obligations of the contract implied in the charter cannot afterwards be impaired, nor the essential franchise taken without due compensation.<sup>2</sup>

§ 220. **The Same Subject; Acceptance of a Charter by the Incorporators; Conditions Precedent, etc.**—A charter is inoperative until it is accepted by the persons intended to be incorporated; and the grant may be withdrawn meantime; but after it has once been sufficiently accepted, the legal duties and liabilities attach, according to the terms of the charter, and cannot be disavowed at the pleasure either of the State or the individuals concerned. No precise form of acceptance is necessary; for while any man may refuse a grant, yet he may be bound by collateral acts which imply an acceptance on his part; and hence we find that where the persons named in a charter have acted under it, held meetings, adopted by-laws, and elected officers in conformity with its terms, they are considered to have accepted it, although acceptance should usually be by a majority vote of the persons incorporated.<sup>3</sup> A charter must be accepted on the terms offered; not conditionally, nor partially, nor for a less time than stated therein. A substantial compliance with all the forms prescribed by a general statute authorizing incorporation is a prerequisite, and a sufficient one, to corporate existence.<sup>4</sup> The same prin-

<sup>1</sup> Brightly Fed. Dig. 182; Falconer v. Campbell, 2 McLean, 195. See *supra*, § 218, n.

<sup>2</sup> Thorpe v. Rutland, &c. R. R. Co., 27 Vt. 140; Madison, &c. R. R. Co. v. Whiteneck, 8 Ind. 217; Gorman v. Pacific R. R. Co., 26 Mo. 441.

<sup>3</sup> 1 T. R. 575; 1 Kyd, 63; Ang. & Ames, §§ 81-83; Bangor R. R. Co. v.

Smith, 47 Me. 34; Abb. Dig. Corp. "Acceptance;" Russell v. McLellan, 14 Pick. 63; Zabriakie v. Cleveland R. R. Co., 23 How. 381; Morawetz, §§ 12-16, and cases cited.

<sup>4</sup> Green v. Seymour, 3 Sandf. Ch. 285; Harris v. McGregor, 29 Cal. 124. See Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546.

ciples of law will apply to the acceptance by an existing corporation of a new or amended charter.<sup>1</sup>

Private corporations are frequently organized in these days, under general acts; and for such organization a substantial compliance with all the terms imposed by the act as conditions precedent is the essential prerequisite.<sup>2</sup>

§ 221. **Language of Legislative Acts of Incorporation.**—To create a corporation, such words as “found,” “erect,” “establish,” or “incorporate” are commonly used; but they are not essential; the intention of the legislature in enacting a law of this kind being the main thing which the courts will regard.<sup>3</sup>

§ 222. **Constituent Elements of a Private Corporation.**—There are certain constituent elements in every private corporation. A body corporate is usually made up of natural persons in their natural capacity. Every corporation should have a name,—or, as Coke called it, a name of baptism,—by which it may be known as grantor and grantee, perform all legal acts, hold and transmit property, and sue and be sued; and here we notice that the name of this legally created being usually expresses the objects for which it was founded, and that it is sufficiently named whenever the identifying words are used; but a natural person's name is short, and cannot suffer verbal changes without losing the means of identification altogether.<sup>4</sup> And, since corporate powers are only locally exercised, every corporation should be constituted as of some particular place; and the principal office

<sup>1</sup> Commonwealth v. Cullen, 18 Penn. St. 133.

<sup>2</sup> Morawetz, § 17, and cases cited; Utley v. Union Tool Co., 11 Gray, 139; People v. Selfridge, 52 Cal. 331; 55 Barb. 45; Doyle v. Mizner, 42 Mich. 332; Hurt v. Salisbury, 55 Mo. 310. So, too, there may be conditions precedent under a special charter, whose observance is essential in the same sense. Morawetz, § 18.

<sup>3</sup> Phillips v. Pearce, 5 B. & C. 423; Lawrence v. Fletcher, 8 Met. 153; 1 Kyd, 63; Ang. & Ames, §§ 76, 77; Morawetz, § 9; Liverpool Ins. Co. v.

Massachusetts, 10 Wall. 566. Corporations are the creatures of local law, and they have no powers out of the State where they were created, except such as are conceded by the *lex loci*; though, we may add, the legal principles applicable to consolidated railways which operate in a number of States are lately developing. See Paul v. Virginia, 8 Wall. 168; Interstate commerce act (1887); 118 U. S. 557; 158 U. S. 564.

<sup>4</sup> Ang. & Ames, §§ 95-102; 2 Kent Com. 292; Forbes v. Marshall, 11 Ex. 166; Sutton v. Cole, 3 Pick. 232.



for the transaction of business usually determines the local residence of this ideal inhabitant.<sup>1</sup>

The powers and capacities which are essential to all corporations, and implied in every act of incorporation, are often enumerated as follows: (1) to have perpetual succession, admitting new members to fill old vacancies; (2) to sue and be sued, implead and be impleaded, grant and receive by its corporate name, and do all other acts as natural persons may; (3) to purchase and hold property, whether real or personal, for the benefit of its members and their successors; (4) to have a common seal; (5) to remove members. But, as Mr. Kyd says, some of these powers are to be taken in many instances with much modification and restriction; for the essence of a corporation consists only of a capacity to have perpetual succession, under a special denomination and an artificial form, and to take and grant property, contract obligations, and sue and be sued by its corporate name, and to receive and enjoy, in common, grants of privileges and immunities.<sup>2</sup> The incidental powers and capacities of every corporation are subject moreover to such limitations as may be prescribed by the sovereignty which creates it; nor has any corporation other powers than such as are specifically granted, or are within the letter and spirit of the act of incorporation.<sup>3</sup>

§ 223. **Internal Organization and Management; Directors, Membership, etc.** — The internal management of a private corporation is primarily vested in the members; but it is more immediately in the hands of the president and directors, or a sort of managing board with a chief executive at the head.

In joint-stock corporations, — those which consist in combinations of capital, usually for some business purposes, — the rights of membership are incident to the ownership of stock. As Shaw, C. J., has observed, in all bridge, railroad,

<sup>1</sup> Bank of U. S. v. Devaux, 5 Cr. 84; Ang. & Ames, § 107; Ohio R. R. Co. v. Wheeler, 1 Black, 286; Potter v. Bank of Ithaca, 7 Hill, 530.

<sup>2</sup> 1 Kyd, 13, 69, 70; 2 Kent Com. 278.

<sup>3</sup> Ang. & Ames, § 111; Dublin v. Attorney-General, 9 Bligh, n. s. 395;

and turnpike corporations, in all banks, insurance corporations, manufacturing corporations, and, generally, in corporations having a capital stock and looking to profits, membership is constituted by a transfer of shares, according to the by-laws, without any election on the part of the corporation itself.<sup>1</sup> This right to elect officers and otherwise control the corporate interests may, however, be modified by the express terms of the charter or a general statute applicable to the company.<sup>2</sup> And members of private corporations sometimes make a by-law, creating a select body to whom they delegate the power of electing officers and members.<sup>3</sup> The charter or statute is usually explicit as to the times and manner of election and the qualification of voters; otherwise the corporation may regulate such matters for itself. At the proper time and place of meeting, every candidate is proposed (though nominating committees frequently regulate the presentation of lists to the members at large), and those having a majority of the votes cast, the assembly being sufficiently large, are the officers elected; no more officers being chosen than such as suffice to complete the proper number; and a plurality or any other system being optional in preference to a majority vote, if regularly and properly adopted by the members at large.<sup>4</sup> For we are to remember that members of a private corporation are not unlike citizens and voters under a constitutional form of government. Where the election was conducted in good faith, the officers appointed are usually considered to have been properly appointed, in the absence of positive formalities which were neglected; and persons acting publicly as officers of a corporation are always presumed to be rightfully in office. When questions of this sort are raised, the language of the charter or statute will usually be resorted to as determining whether the irreg-

Beatty v. Knowler, 4 Pet. 152; Brightly Fed. Dig. 182, 183.

<sup>1</sup> Poor v. Sears, 22 Pick. 122. And see Ang. & Ames, § 118; Gilbert v. Manchester Iron Co., 11 Wend. 627; Downing v. Potts, 8 N. J. 66. See chapter, *infra*, on Stocks and Shares.

<sup>2</sup> Ang. & Ames, §§ 115-118; Commonwealth v. Gill, 4 Whart. 228.

<sup>3</sup> 12 Mod. 225; *Ex parte Wilcocks*, 7 Cow. 407.

<sup>4</sup> 2 Kent Com. 204; Ang. & Ames, *passim*, §§ 118-123; Morawetz, §§ 236, 382.

ular election was void or only voidable; and where a person has been *de facto* elected to a corporate office, and has accepted and acted in the office, the validity of his election and his title to the office in the latter instance can only be tried in proceedings on a *quo warranto* information.<sup>1</sup>

§ 224. **The Same Subject; Powers of Directors, Corporate Officers, etc.**—The management of private corporations is usually vested in certain officers and boards; the body of the members having no voice except in their election.<sup>2</sup> The board of directors, as it is called, constituting a sort of executive committee, though with more than purely executive functions, represents the corporation, and in general may act as such, and, unless specially restricted, exercise all the corporate powers.<sup>3</sup> It would be manifestly inconvenient for a large body of members to meet and transact the multifarious details of corporate business; hence, the custom, in the present day universal, of choosing a special board or body of directors, as the representatives, agents, or managers of the corporation at large. There was formerly great stress laid upon the use of the corporate seal, as indispensable to the validity of the business contracts of a corporation; but the modern rule is, that the acts of the board of directors are as binding upon the corporation when evidenced by a legal vote; and, in the absence of a charter, statute, or by-laws expressly providing otherwise, a majority of the directors of a joint-

<sup>1</sup> *Waite v. Windham, &c.*, Mining Co., 36 Vt. 18; *Frost v. Frostburg Coal Co.*, 24 How. 278; *Bank v. Dandridge*, 12 Wheat. 79; *Ang. & Ames*, §§ 137-141; *Regina v. Mayor of Chester*, 34 E. L. & Eq. 59.

<sup>2</sup> *Bank v. Dandridge*, 12 Wheat. 113; *Ridgway v. Farmers' Bank*, 12 S. & R. 256; *Morawetz*, § 382. A majority of stockholders are incompetent to divest the directors of the fundamental management of concerns; and manifestly the body of shareholders is incapable of managing the corporate business efficiently. *Taylor*, § 180. The "constitution"

or fundamental charter is not to be altered except as that instrument provides.

Some corporations are so organized that the fundamental law leaves corporate power discretionary with the shareholders themselves to a great extent. In such case the shareholders may by resolution or by-law delegate authority to their directors and correspondingly revoke it. *Taylor*, § 219.

<sup>3</sup> *Burrill v. Nahant Bank*, 2 Met. 163; *Whitwell v. Warner*, 20 Vt. 425; *Ang. & Ames*, §§ 228-231, 276-283.

stock corporation, organized for transacting some kind of business, constitute a quorum; and a majority of the quorum have authority to decide any question within the scope of the corporate powers.<sup>1</sup>

The board of directors being, in effect, but agents of the members at large; and every corporation having the implied right to choose its own general and special agents; the directors can only act for it and bind it within such limits and in such modes as the charter, statute, by-laws, or some acts of the members authorize.<sup>2</sup> No general rule can be laid down in this respect, for their powers will differ with the rules and usage of the business; and we must refer to the laws of agency to determine the principles on which the corporation will be bound by their acts.<sup>3</sup> In chartered banking and insurance companies, and joint-stock business corporations generally, the exclusive agency is generally put into the hands of the directors by the incorporating act; so that while the stockholders elect their board of managers, the managers themselves derive their authority from the charter, and are agents, not of the stockholders, but of the corporation; in which case they exercise large discretionary powers, and the body at large cannot control their movements, except in the matter of election, nor compel them to do contrary to their own judgment.<sup>4</sup> And the usages of well-established corporations may guide where the fundamental law fails of guidance.<sup>5</sup> The directors may commit authority to others among themselves; and here, as in the State, some executive officer is requisite for ordinary routine business,—such as a president; while other officers are employed, such as

<sup>1</sup> Cowp. 248; *Sargent v. Webster*, 13 Met. 497; *Fleckner v. U. S. Bank*, 8 Wheat. 357; *Co. Lit.* 66 b; *Randall v. Van Vechten*, 19 Johns. 65; *Morawetz*, §§ 167, 247. The directors act as a board and not singly; nor should formalities prescribed by the charter or constitution be disregarded, whether as to calling meetings or in other respects. *Morawetz*, § 247, and cases cited.

<sup>2</sup> *Salem Bank v. Gloucester Bank*, 17 Mass. 29; *Ang. & Ames*, § 231; *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Morawetz*, §§ 238, 242, 248.

<sup>3</sup> *Ib.*

<sup>4</sup> *Bank v. Dandridge*, 12 Wheat. 113; *Royalton v. Royalton, &c. Co.*, 14 Vt. 311; *Commonwealth v. St. Mary's Church*, 6 S. & R. 508.

<sup>5</sup> See *Taylor*, § 195.

secretaries, treasurers, and cashiers of banks; all of whom are usually designated as officers with powers defined in the act of incorporation or the by-laws; while their selection and the general employment of clerks, messengers, operatives, attorneys, and others, with the length of service and rates of compensation, are all matters left to a great extent under the control of the directors themselves.<sup>1</sup> A board of directors, authorized to conduct the affairs of a bank, may empower the president, or the president and cashier, to borrow money, indorse its notes, or obtain a discount for the use of the bank.<sup>2</sup>

§ 225. **The Same Subject.**—But the authority to borrow money requires to be carefully guarded; and where a corporation is organized for manufacturing and other more general purposes, the directors are not presumed to have financial powers to delegate or exercise so extensive.<sup>3</sup> And under all circumstances the purposes of the incorporation must be regarded; nor are boards of directors empowered to go beyond their charter.<sup>4</sup> They cannot alienate, pledge, or mortgage as individuals property essential for the corporate purposes, misappropriate moneys, assign over the corporation effects, speculate, make donations to themselves or their friends, or in any way deal with the funds entrusted to their keeping other than as honest and prudent men who feel bound to follow the terms of their authority and have no adverse or sinister ends to subserve.<sup>5</sup> In England the rule in this and other respects is a strict one; and even compensation for their services has been refused, unless rendered under some express contract or a vote of the company; though the American

<sup>1</sup> *Union Bank v. Ridgely*, 1 Har. & G. 324; *Dedham Bank v. Chickering*, 3 Pick. 335; *Ang. & Ames*, § 285; *Waite v. Windham, &c. Mining Co.*, 37 Vt. 608; *Morawetz*, § 248; *Taylor*, §§ 233–246.

<sup>2</sup> *Fleckner v. U. S. Bank*, 8 Wheat. 338; *Merrick v. Bank of Metropolis*, 8 Gill, 59; *Olcott v. Tioga R.*, 27 N. Y. 546.

<sup>3</sup> See *Burmester v. Norris*, 6 Ex. 796.

<sup>4</sup> *Rollins v. Clay*, 33 Maine, 132;

*Gibson v. Goldthwaite*, 7 Ala. 281; *Redmond v. Dickerson*, 1 Stockt. 507; *Morawetz*, § 242; *Pickering v. Stephenson*, L. R. 14 Eq. 322; 1 *Pet.* 171; *Taylor*, § 192.

<sup>5</sup> *York Railway Co. v. Hudson*, 16 Beav. 495; *Butts v. Wood*, 37 N. Y. 317; *Abb. Dig. Corp.* 280, 284; *Butler v. Cornwall Iron Co.*, 22 Conn. 335; *Koehler v. Black River, &c. Co.*, 2 Black, 715; *Hoyle v. Plattsburgh R.*, 54 N. Y. 314; *Morawetz*, §§ 243–245.

rule in this respect is more liberal. The officers and directors of a corporation are often regarded as trustees for the stockholders, rather than agents; and in securing to themselves an advantage not common to all, they certainly commit a plain breach of official duty.<sup>1</sup> Directors cannot as a rule wind up the concern, nor dispose of the assets as tantamount to such procedure.<sup>2</sup> Nor does their authority to manage the stock, property, and affairs of the corporation, give them authority to make important changes in the scheme and nature of the corporate enterprise, or to apply to the legislature for enlarging the corporate powers.<sup>3</sup> Nor to exclude members from a reasonable right to inspect their books; since they would thus be unduly shielded from responsibility for their official conduct.<sup>4</sup> And yet some of these powers might have been conferred expressly upon the board of directors, by charter or otherwise, and in consequence would be rightfully exercised. By inference from a charter for business purposes, directors have the honest discretion of declaring dividends or not.<sup>5</sup>

§ 226. *The Same Subject.*—Persons dealing with a cor-

<sup>1</sup> *Ib.* Directors ought not to represent the company where they have conflicting private interests to subserve. Morawetz, § 245; 54 N. Y. 314; Pennsylvania R.'s Appeal, 80 Penn. St. 265; *Wardell v. Railroad*, 103 U. S. 651. A director ought not to purchase assets of the corporation. *McCowell v. Arkansas Co.*, 38 Ark. 17. As to a director's personal liability for wrongfully appropriating the corporate funds, see 21 Ch. D. 322. It is a breach of trust for directors to sell their own shares to the corporation. *Shattuck v. Oakland Co.*, 58 Cal. 550.

<sup>2</sup> *Ang. & Ames*, § 280; Morawetz, § 240; *Rollins v. Clay*, 38 Me. 132; 1 *Harring*, Ch. 106. But directors, by virtue of an authority to pay debts, may convey assets in trust for the benefit of creditors, as some cases hold. 52 Ind. 473; 13 Met. 497;

Morawetz, § 240. And where the charter or good usage justifies such action, directors may borrow money for the corporation, and even secure the indebtedness by a pledge of the corporate personal property. *Saltmarsh v. Spaulding*, 147 Mass. 224; Taylor, § 225. But directors have no inherent power to increase or decrease the capital stock. *Railway Co. v. Allerton*, 18 Wall. 233. Nor to transfer property essential to continuing the corporate business. *Burke v. Smith*, 16 Wall. 390. See Taylor, §§ 227-230.

<sup>3</sup> 2 Conn. 579; Morawetz, § 239; Taylor, § 221; *Railway Co. v. Allerton*, 18 Wall. 233.

<sup>4</sup> *People v. Throop*, 12 Wend. 183.

<sup>5</sup> Morawetz, § 348; L. R. 5 Ch. 621; *Smith v. Prattville Man. Co.*, 29 Ala. 503; *Pratt v. Pratt*, 33 Conn. 446.

poration must take notice of whatever is contained in the law under which it was organized; for a corporation cannot vary from the law of its creation. Hence, if the charter or act of incorporation prescribes the mode in which the officers must act, that mode must be followed in order to render their acts obligatory on the corporation.<sup>1</sup> But where formalities have long been disregarded by the directors, and yet they have acted within the scope of their general authority, the corporation will not be permitted in law or equity to set up the negligence of its own agents to the prejudice of third parties.<sup>2</sup> And while directors act as the majority of a quorum, or by such other requisite number as the charter may prescribe, the record of their acts is not in general necessary to the validity of the acts, since requirements concerning the corporation records are usually directory and nothing more.<sup>3</sup>

§ 227. **The Same Subject.** — As to the liability of a corporation officer to the corporation for all damages occasioned by a violation of his duties and obligations, the principle is much the same as in an ordinary agency. For all damages occasioned by the violation of his official duties, the officer of a corporation is responsible to his principal; and this principal is the corporation, and not individual stockholders. Hence, proceedings brought to enforce the responsibilities of directors must usually be conducted in the name of the corporation.<sup>4</sup> But equity, in furtherance of natural justice, and for the reason that there can be no wrong without a remedy, has permitted stockholders, as the real parties in interest, to file a bill in their own names where there is such collusion and fraud in the control of the corporation that prosecution

<sup>1</sup> Ang. & Ames, § 291; Taylor, § 201; Williams v. Chester R. R. Co., 5 E. L. & Eq. 503. See Head v. Providence Ins. Co., 2 Cr. 166.

<sup>2</sup> Bargate v. Shortridge, 5 H. L. Cas. 297; Zabriskie v. Cleveland R. R. Co., 23 How. 381, 398; Ang. & Ames, § 291; Morawetz, § 246; Pennsylvania R.'s Appeal, 80 Penn. St. 265.

<sup>3</sup> Hutchins v. Byrnes, 9 Gray, 370. The formalities of a meeting of the directors seem, however, to be rather strictly insisted upon in England. See D'Arcy v. Tamar R. R. Co., L. R. 2 Ex. 158; Waite v. Windham &c. Mining Co., 37 Vt. 608.

<sup>4</sup> Ang. & Ames, § 312; Brown v. Vandyke, 4 Halst. 795; Abbott v. Merriam, 8 Cush. 588.

is obstructed.<sup>1</sup> Of course, the directors of a corporation are not to be presumed infallible; and for losses suffered through mere error of judgment on their part, — there being neither culpable negligence nor fraud apparent, — they are not made liable, more than the agents of natural persons would be under similar circumstances; and this principle is frequently applied where subordinates are selected by them who prove unworthy of trust and bring mischief to the corporation.<sup>2</sup> Directors, on the other hand, who sanction a breach of trust and aid in embezzlement are certainly responsible for their misconduct.<sup>3</sup> And a director renders himself liable, as it is held, who has knowingly assented to a dividend amounting to more than the profits, or to making false reports to the shareholders; for this is a violation of duty both towards the stockholders and the public.<sup>4</sup> In fine, the powers, rights, duties, and obligations of directors are, when uncontrolled by the act of incorporation or the by-laws of the corporation, to be determined on the principles of the law of agency; and in adjusting controversies of this sort, as between themselves and the corporation at large, we must examine in every case the act of incorporation and the by-laws; since the general power of making by-laws may remain in the stockholders at large, who are then at liberty to circumscribe the power of the directors as they may deem fit.<sup>5</sup>

<sup>1</sup> *Koehler v. Black River Co.*, 2 Black, 715; *Turquand v. Marshall*, L. R. 6 Eq. 112.

<sup>2</sup> See *Scott v. Depeyster*, 1 Edw. Ch. 513; *Williams v. Gregg*, 2 Strobh. Eq. 316; *Spering's Appeal*, 71 Penn. St. 11; *Dunn v. Keyle*, 14 Bush, 134.

<sup>3</sup> *Attorney-General v. Leicester*, 7 Beav. 176.

<sup>4</sup> *Hill v. Frazier*, 22 Penn. St. 320; *Flitcroft's Case*, 21 Ch. D. 322.

<sup>5</sup> See *Ang. & Ames*, §§ 299, 315; *Pratt v. Hudson River R. R. Co.*, 21 N. Y. 305; *Hotchin v. Kent*, 8 Mich. 526.

The implied powers of the president of a corporation depend upon the nature of the company's business and

the measure of authority delegated to him by the board of directors. There are recent cases which, admitting the difficulty of defining precisely the nature and extent of these powers, deny to the president the general right to dispose of corporate property at his personal discretion, or to be otherwise regarded, save for a delegated authority as executive, as more than the presiding director at the board. See 37 N. J. L. 98, 102; *Chicago R. v. James*, 22 Wis. 198; 14 Wis. 325. Yet the peculiar business, charter, usage, &c., may relax such a rule. See *Smith v. Smith*, 62 Ill. 493; *Morawetz*, §§ 251, 252.

The peculiar functions and exten-



§ 228. **By-laws of a Private Corporation.** — From what has already been said, the reader will gather that the *by-laws* of a corporation are of considerable influence in shaping the distribution of corporate powers and determining the methods of its organization and management. The power of making by-laws, or, as they are called, private statutes, for its government and support, is an incident to every corporation, included in the very act of incorporation. "For," says Blackstone, "as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic."<sup>1</sup> Yet this power is not generally left to implication, but will be almost always found expressly conferred by the act of incorporation; that being a sort of "private constitution," to which the by-laws of the corporation, like the legislative acts of a State, must always conform. Of course, the by-law of a corporation in this country must not contravene the State or United States constitution, nor, indeed, should the charter; and, besides being subject to these and the charter creating it, the by-law of a corporation must be in itself reasonable; whence, by-laws in restraint of trade or repugnant to sound morals have been pronounced void; while a by-law which might under one construction be unreasonable has received another construction which would make it reasonable.<sup>2</sup> A by-law may be good in part and bad in part; or the whole may be vitiated by the bad part, according to circumstances.<sup>3</sup> The power of making by-laws is to be exercised by the members at large according to common-law methods, or rather after the same manner in which the charter directs them to transact their general business; and here again the act of incorporation, whether special

sive authority of the cashier or executive officer of a bank are discussed at length in 3 Mason, 506, *per* Mr. Justice Story; *Merchants' Bank v. State Bank*, 10 Wall. 604, and other cases cited; *Morawetz*, §§ 253, 254.

<sup>1</sup> 1 Bl. Com. 476; *Abb. Dig. Corp. "By-Laws;"* Ang. & Ames, §§ 110, 325; 1 Kyd, 69; *Hob.* 211; *Taylor*, § 582.

<sup>2</sup> *Ib.*; *Hob.* 210; *Brightly Fed. Dig.* 188, 189; *Kennebec R. R. Co. v. Kendall*, 31 Me. 470; *Commonwealth v. Worcester*, 3 Pick. 462; *Queen v. Saddlers' Company*, 10 H. L. Cas. 404; *Vedder v. Fellows*, 20 N. Y. 126.

<sup>3</sup> See *Abb. Dig. supra*; *Rogers v. Jones*, 1 Wend. 237.

or general, may throw light on the subject. The will of the majority determines presumably in such cases.<sup>1</sup>

The power to make by-laws presupposes the power to enforce them by appropriate penalties, or to repeal them altogether;<sup>2</sup> but their repeal cannot affect vested rights under a fundamental law, any more than their passage.<sup>3</sup> And by-laws, when made, are binding upon all the members of the corporation, and upon others acquainted with their mode of business conformably to the by-laws. By-laws regulating the directors and other agents of the company as to the business management should be observed by them.<sup>4</sup> But those who deal with a corporation in ignorance of a certain by-law cannot be affected in their rights merely because the by-law exists; for members and officers are presumed to know all the by-laws, while third persons must have had the knowledge of any by-law brought home to them in such a manner that it entered into the mutual agreement.<sup>5</sup>

§ 229. *The Corporate Seal.* — Much significance was formerly attached to the corporate seal; probably because such of our ancestors as could not write found the use of a seal almost indispensable to authenticate their solemn acts. But it must be admitted that there is a peculiar propriety in giving to every corporation, as well as to every government, an official seal, to be used in formal instruments as a means of confirming the authority and assuring the deliberate purpose of the officers who execute on behalf of the corporation at large. Blackstone carries this reason very far when he asserts that a corporation acts and speaks *only* by its common seal, because, being an invisible body, its intentions cannot be manifested by any personal act or oral discourse;

<sup>1</sup> Morawetz, § 366. The term by-law was originally applied to the laws and ordinances enacted by public or municipal corporations. Morawetz, § 366.

<sup>2</sup> *Rex v. Westwood*, 2 Dow. & C. 21; *Ang. & Ames*, §§ 327-329; *Taylor*, § 584; *Abb. Dig. Corp. "By-Laws;"* *Union Bank v. Ridgely*, 1 Harr. & G. 324.

<sup>3</sup> See *Kent v. Quicksilver Co.*, 78 N. Y. 159.

<sup>4</sup> *Stevens v. Davison*, 18 Gratt. 819. See Morawetz, §§ 366-370.

<sup>5</sup> *Ib.*; *Palmyra v. Morton*, 25 Mo. 593; 2 Kyd, 156; *Royal Bank of India's Case*, L. R. 4 Ch. 252; Morawetz, §§ 352, 370. The rights of a third person under a by-law to establish a legal claim must depend

for, in truth, government speaks by its legislative acts, and every corporation public or private manifests its intention clearly enough by its ordinances or by-laws.<sup>1</sup>

At the present day private corporations make contracts and manifest their assent either by the common seal, or in other words by deed; or by the vote of the corporation; or by the contracts or agreements of their authorized agents; and so, too, the inference of a promise by implication may be drawn from certain corporate acts.<sup>2</sup> With the progress of invention, and the enormous growth of business details, we find ourselves, in this day, gladly escaping many of the clumsy formalities which were in favor at a time when men found ample leisure for solemnizing every important legal transaction; and the impression of a corporate seal upon the substance of the paper is now regarded commonly as quite effectual without the use of the once significant wax; though, as the courts of some States rule, the seal is not sufficiently affixed if printed on a blank certificate at the time when the rest of the paper was printed, and afterwards signed by the corporate officer.<sup>3</sup> The effect of sealing is the same as when an individual signs and seals; it makes the contract a specialty or sealed instrument.<sup>4</sup> We should be careful to distinguish the individual from the corporate signature and execution; and it must always be borne in mind that the corporate seal affixed to a contract or conveyance does not render the instrument valid unless affixed by an officer or agent duly authorized either generally or specially for that purpose.<sup>5</sup>

upon general contract principles. *Flint v. Pierce*, 99 Mass. 68.

<sup>1</sup> 1 Bl. Com. 475; Ang. & Ames, § 216; Taylor, §§ 12, 248.

<sup>2</sup> Ang. & Ames, § 112; Morawetz, § 167.

<sup>3</sup> See *Hendee v. Pinkerton*, 14 Allen, 381; *Haven v. Grand Junction R. R. Co.*, 12 Allen, 337; Ang. & Ames, § 218 *et seq.*; Abb. Dig. Corp. "Seals."

<sup>4</sup> *Ib.*; *Clark v. Woollen, &c. Co.*, 15 Wend. 256. The usual style is

to affix, "In witness whereof, the A. B. corporation, by J. S., their [treasurer], duly authorized for this purpose, have hereunto," &c.; J. S. signing with the addition of his official name; but less formal methods of execution are sometimes sustained. Ang. & Ames, § 227; *Hutchins v. Byrnes*, 9 Gray, 367. See *Eureka Company v. Bailey Company*, 11 Wall. 488.

<sup>5</sup> *Damon v. Granby*, 2 Pick. 345; *Bank of Ireland v. Evans*, 5 H. L.

§ 230. **Power of Private Corporations to hold and dispose of Personal Property.**—To investigate the powers and capacities of corporations at length would be foreign to the purpose of the present treatise; and the reader should refer to more exhaustive works for information on this important topic of law. Of corporation stock and the rights of stockholders, we shall speak in a future chapter. But having sufficiently set forth those legal principles which determine the organization of private corporations, we now come to a most pertinent branch of the present subject: namely, the power of such corporations to take, hold, transmit in succession, and alienate personal property.

§ 231. **The Same Subject; Right to purchase and hold Personal Property.**—The rule is generally stated quite broadly, and to this effect, that every corporation has at common law a right, incidental to its creation, to take, hold, and in succession transmit property, both real and personal, to an unlimited extent or amount.<sup>1</sup> As to personal property in particular, this unlimited right is asserted in the absence of charter restrictions.<sup>2</sup> But while a business corporation ought to be able to hold and dispose of property to an extent sufficient to inspire confidence in its resources and enable it to pursue legitimate ends, a limit may not unreasonably be imposed; and in some cases it is maintained that even the common law gave corporations the right to purchase and hold property only so far as might enable them to fulfil the objects of their creation.<sup>3</sup> Be this as it may, we find that it is quite common for an act of incorporation or general statute not only to require that the whole capital stock, or a certain amount of it, shall be paid in or subscribed before the corporation can commence operations, but also to limit the right of holding prop-

Cas. 389; *Koehler v. Black River Co.*, 2 Black, 716; *D'Arcy v. Tamar R. R. Co.*, L. R. 2 Ex. 161; *Morawetz*, § 168.

<sup>1</sup> *Abb. Dig. Corp.* 584; 2 *Kent Com.* 281; 1 *Bl. Com.* 475; *Ang. & Ames*, § 145, and cases cited; *Taylor*, §§ 128, 129; *McCartee v. Orphan*

*Asylum Society*, 9 *Cow.* 437; *Overseers of Poor v. Sears*, 22 *Pick.* 122.

<sup>2</sup> See § 233.

<sup>3</sup> See *Page v. Heineberg*, 40 *Vt.* 81; *Blanchard's Factory v. Warner*, 1 *Bl. C. C.* 258; *State v. Commissioners*, 3 *Zabr.* 510.

erty to whatever amount may be needful or necessary to the object of its creation. And in such cases the decision of the court will usually turn upon mere construction.

To prevent monopolies, to place a check upon arbitrary power, and to guard the public against those evils which attend the wielding of immense wealth in the hands of a few, our State legislatures often indicate plainly, in the charters they grant, how much property the corporation may hold at the outside limit, in what it shall consist, the purposes for which it shall be purchased and held, and the mode in which it shall be applied.<sup>1</sup> But the amount of capital stock to which a corporation is by its charter limited is not *per se* a limitation upon the amount of property which it may own, or upon its outstanding liabilities; for the capital stock is rather to be regarded as that sum, divided into shares, which represents the aggregate interests of the various stockholders, and upon which assessments are to be computed and dividends paid.<sup>2</sup> Nor are the individual members of a corporation legal owners of the corporate property, either jointly or as partners; though in some joint-stock companies of a peculiar character a sort of partnership is found to exist among the associated members.<sup>3</sup> In what are, strictly speaking, corporations, the corporation, as such, is the sole owner, notwithstanding the individual stockholders are indirectly to profit by the increase or lose by the destruction of the property.<sup>4</sup>

<sup>1</sup> Callaway Co. v. Clark, 32 Mo. 305; Ang. & Ames, § 146; Minor v. Mechanics' Bank, 1 Pet. 46.

<sup>2</sup> Ang. & Ames, § 151 *et seq.*; Harpending v. Dutch Church, 16 Pet. 492; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280.

<sup>3</sup> See § 201.

<sup>4</sup> Regina v. Arnaud, 9 Q. B. 806; Abb. Dig. 584. To show that the limitations imposed upon corporations, in respect of the power to hold property, give rise to nice distinctions, even where the construction of words used in the charter determines

the controversy, let us take two American cases, decided the one in Missouri, and the other in New Jersey. In each case a corporation was authorized in effect by its charter to hold such property as might be needful or necessary to the object of its creation. The Missouri corporation was created for the purpose of mining and transporting coal; and the court decided that it might properly purchase and own a steam-boat for transporting and delivering the coal. Callaway Co. v. Clark, 32 Mo. 305. But see Pearce v. Madison, &c.

§ 232. **The Same Subject.** — The rights of corporations are not equally favored in all parts of this country. Sometimes jealousy of their encroaching force seems to influence the decision of the court; on the other hand, it is often, especially where railways are concerned, confidence that a new and undeveloped region will be laid open to prosperous trade, or deference to capital allied with power. Prohibitions in an act of incorporation receive frequent consideration; and it is said that there is a broad distinction between a prohibition in a corporation charter to purchase or take, and a prohibition to hold.<sup>1</sup> Corporations are usually allowed to purchase and hold bills of exchange and promissory notes within the limits already indicated.<sup>2</sup> As to the power of a corporation to hold its own stock or to subscribe for stock in another corporation independently of charter provisions, there is some uncertainty. A corporation's right to purchase its own stock appears to be in disfavor in England; while in this country the rule is rather, that there is no illegality in doing so, though the exercise of such a right admits of some salutary qualifications.<sup>3</sup> For one corporation to subscribe in the stock of another would be objectionable, and — unless in some way authorized by the charter — would probably be treated in most cases as void.<sup>4</sup> And yet it is held not objec-

R. R. Co., 21 How. 441. The New Jersey corporation was a railroad and transportation company; and in this case it was held that among the necessary appendages were suitable depots, car-houses, water-tanks, shops for repairing engines, houses for switch and bridge tenders, and coal or wood yards for the use of the locomotives; all of which, then, it might erect, maintain and own; but as what was necessary did not extend to things merely convenient or advantageous, it could not set up factories for making its own rails, engines, and cars, nor purchase coal mines to supply its fuel. *State v. Commissioners*, 3 Zab. 510. And see *Railroad v. Berks County*, 6

Penn. St. 70; *Worcester v. Western R. R. Co.*, 4 Met. 564.

<sup>1</sup> *Leazure v. Hillegas*, 7 S. & R. 818; *Runyan v. Coster*, 14 Pet. 122; *Blunt v. Walker*, 11 Wis. 334.

<sup>2</sup> See Abb. Dig. Corp. 586, 587.

<sup>3</sup> *Taylor*, §§ 134, 135; *Vail v. Hamilton*, 85 N. Y. 453. An insolvent corporation cannot thus purchase, nor is the prior holder to be thus relieved of his statutory liability to creditors. *Ib.*

<sup>4</sup> *Mechanics' Savings Bank v. Meriden Agency Co.*, 24 Conn. 159; *Morawetz*, § 197; *Clearwater v. Meredith*, 1 Wall. 40. In *Branch v. Jesup*, 106 U. S. 468, it was recently held that the purchase by one railway company of a road constructed by another was not *ultra vires*. See § 245, *post*.

tionable for directors to take stock in another company in payment of property sold and as the means of selling it, if taken with a view to selling it again.<sup>1</sup> Savings banks are often authorized by statute to invest in the stock of other banks, as a species of prudent investment. The great danger to be avoided is that of permitting a corporation to push wild schemes for the absorption of power,—a permission which is constantly craved on the part of an enterprising directory, and secured whenever one company may purchase a controlling influence in the affairs of another.

§ 238. **Power to hold Real Estate; Statutes of Mortmain.**—As to the right of a corporation to hold real estate, we may observe that, in order to restrain it, a variety of statutes, from the days of *Magna Charta* and King Henry III. down to the reign of George II., have been passed, known as the statutes of mortmain, and originally designed to loosen the “dead clutch” of the ecclesiastical corporations upon lands and tenements, though afterwards extended in principle to lay corporations. It is noticeable that these statutes make no mention of personal property.<sup>2</sup> And, although originating in the feudal system, the policy of this mortmain legislation was known to the civil law.<sup>3</sup> A corporation cannot take an estate in joint tenancy, either jointly with another corporation or with a natural person.<sup>4</sup> And while the common-law principle may be considered as applicable alike to real and personal property, so far as concerns the right of a corporation to purchase and hold it, the statutes of mortmain long since established, where such statutes prevailed, an essential practical difference on behalf of things personal.<sup>5</sup> Devises of

<sup>1</sup> *Hodges v. N. E. Screw Co.*, 3 R. I. 9. And see *Howe v. Boston Carpet Co.*, 16 Gray, 493.

<sup>2</sup> 1 Bl. Com. 479; Ang. & Ames, § 148; *Baird v. Bank of Washington*, 11 S. & R. 411; *Vanseat v. Roberts*, 3 Md. Ch. 119; 2 Kent Com. 283; 2 Redf. Wills, 1st ed. 783; Morawetz, §§ 156-161; Taylor, § 128.

<sup>3</sup> *Browne's Civil Law*, 145; Ang. & Ames, § 150.

<sup>4</sup> *Telfair v. Howe*, 3 Rich. Eq. 235.

<sup>5</sup> The statutes of mortmain, though in force in Great Britain, appear in many of the United States to have no force, or else to apply merely to ecclesiastical corporations. However, legislative provisions are to be found in various States, expressed either in special charters or general laws, inspired by the English policy. See

lands to corporations are not favored by our law.<sup>1</sup> And yet, there are many of our modern corporations whose business essentially requires the holding of real estate, and public policy moulds the legislative grant accordingly.<sup>2</sup> So are some modern corporations created expressly for the purpose of dealing in lands.<sup>3</sup>

It is one thing, however, to purchase directly, and another to hold property by reason of the foreclosure of some mortgage or the forfeiture of some pledge given to secure a *bond fide* debt. Corporations, like individuals, necessarily become creditors in the course of business; and common prudence dictates that a debt due be sometimes secured by mortgage or otherwise. The power to take mortgages is often given to a corporation by its charter; and, even if not, it is usually an implied power, provided the debt were *bond fide* created in the regular course of business.<sup>4</sup> In some States a bank may receive real estate as security for a loan or in payment of debts.<sup>5</sup> Even a prohibition on purchasing or dealing in land does not necessarily forbid taking a mortgage as security.<sup>6</sup> Corporations often lease buildings, too, and are held liable on their covenants.<sup>7</sup> And, whether it be in regard to real estate or some species of personal property, that a corporation is forbidden to purchase and hold such property, under ordinary circumstances, the rule appears to be quite

Morawetz, § 157; Page v. Heineberg, 40 Vt. 81; Odell v. Odell, 10 Allen, 1; Downing v. Marshall, 23 N. Y. 392; 24 How. 465; Miller v. Porter, 53 Penn. St. 292. The right to hold land may be found granted, restricted, or forbidden, under any particular charter in question.

Where a corporation is incompetent under its charter to take real estate, a conveyance to it is voidable and not void, and only direct proceedings at the instance of the State can invalidate it. Fritts v. Palmer, 132 U. S. 282.

<sup>1</sup> See Morawetz, §§ 160, 161; 2 Bl. Com. 372. As to the American doctrine in this respect, see Downing

v. Marshall, 23 N. Y. 366; Taylor, § 391. The English statutes of wills, enacted under Henry VIII., have an important bearing on this question.

<sup>2</sup> As, e.g., railways, and their right to acquire land for their routes by eminent domain, see § 240.

<sup>3</sup> See 151 U. S. 294.

<sup>4</sup> 2 Kent Com. 283; Ang. & Ames, § 156; Susquehannah Bridge Co. v. General Ins. Co., 2 Md. Ch. 418; Silver Lake Bank v. North, 4 Johns. Ch. 370.

<sup>5</sup> Thomaston Bank v. Stimpson, 21 Me. 195; 2 Kent Com. 283; Abb. Dig. Corp. 41.

<sup>6</sup> Blunt v. Walker, 11 Wis. 384.

<sup>7</sup> Abby v. Billups, 35 Miss. 618.



favorable in permitting corporations to secure debts due them, as best they may, even though the collateral security taken should be of the prohibited class.

§ 234. **Power to take by Bequest.** — Corporations have the common-law right of taking personal property by bequest, equally with natural persons; and even a bequest to a corporation of its own stock is valid.<sup>1</sup> But the law in this respect is affected by Statute 43 Eliz. c. 4, relating to charitable uses.<sup>2</sup> Religious corporations, and even unincorporated religious societies, frequently receive gifts and bequests under a will for objects within the scope of their usual duties; and in this country the statute of charitable uses receives a favorable construction from the courts. Even a misnomer of the corporation does not vitiate the bequest, provided its identity be otherwise apparent.<sup>3</sup>

§ 235. **Power to hold Property upon Trusts.** — As to the capacity of corporations to hold property upon trusts, there are English authorities which treat them as incapable, though for reasons somewhat artificial; but in this country their capacity to perform the duties of trustees is generally admitted, and the present American rule is that any corporation may hold property in trust for purposes not foreign to its own institution.<sup>4</sup> Some of our courts seemed disposed to regard this capacity of a corporation even more favorably; yet in matters entirely outside of the proper purposes of the corporation, and more especially if the trust be repugnant to or inconsistent with the duties imposed by its creation, it should be conceded that a corporation has no right to take trust property nor to act as trustee.<sup>5</sup> The right of a cor-

<sup>1</sup> *Ang. v. Ames*, § 177; *Rivanna Nav. Co. v. Dawson*, 3 Gratt. 19; *McCartee v. Orphan Asylum Society*, 9 Cow. 437.

<sup>2</sup> 2 Kent Com. 285; *Ang. & Ames*, §§ 179-185. And see, as to Legacies, *Schoul. Ex'rs*, §§ 458-475.

<sup>3</sup> *Id.* An executory bequest limited to the use of a corporation to be created within the period allowed for the vesting of future estates and inter-

ests is valid. *Burrill v. Boardman*, 43 N. Y. 254.

<sup>4</sup> 1 Kyd, 27; *Ang. & Ames*, §§ 166-168; 2 Kent Com. 285; *Phillips Academy v. King*, 12 Mass. 546; *Morawetz*, § 163; *Vidal v. Girard*, 2 How. 187.

<sup>5</sup> See *Jackson v. Hartwell*, 8 Johns. 422; *Vidal v. Mayor, &c. of Philadelphia*, 2 How. 128; *Trustees v. Peaslee*, 15 N. H. 817.

poration to take a trust which is valid in point of law must be contested by the State, and not by heirs and parties ; and while the corporation may not be permitted to execute a trust upon the grounds already indicated, yet this is no reason why a trust unexceptionable in itself should not be permitted to stand with a new trustee substituted for the corporation.<sup>1</sup>

§ 236. **Right to transfer and dispose of Corporate Property.** — Incidental to the right of holding property is the right to dispose of it at pleasure. Independently, therefore, of positive law to the contrary, all corporations have the absolute *jus disponendi* of all property, whether real or personal, which they may have lawfully acquired. Nor does the circumstance that the State holds some of the stock of the corporation affect this common-law right of alienating the corporation property.<sup>2</sup> And if a corporation has power to dispose of its property in general, it certainly can, like an individual, dispose of any portion it may see fit. It may lease, grant, or mortgage what are rightly its lands, or assign such a mortgage, and may be held liable upon its covenants correspondingly like an individual.<sup>3</sup> It may sell its property in order to raise money for the legitimate objects of its creation ;<sup>4</sup> and if it can borrow, it can borrow upon security

<sup>1</sup> *Bliss v. American Bible Society*, 2 Allen, 334. See *American Academy v. Harvard College*, 12 Gray, 582. This whole subject will be found to have been modified considerably by local statutes ; as, for instance, in New York, where colleges and other incorporated literary institutions are authorized to take real and personal estate in trust for a variety of purposes. N. Y. Stat. May 14, 1840, ch. 318 ; Ang. & Ames, § 168, Lathrop's n. The charter of a corporation sometimes provides in effect that the whole property of the company shall be held as real estate and so descend, or, on the other hand, that it shall be held as personal estate and be transferred and distributed accordingly. Although such clauses are usually

designed to operate as between the stockholders, and not as to strangers, the legislature may give a provision of this kind a more sweeping effect, by using suitable language for that purpose. *Cape Sable Company's Case*, 3 Bland Ch. 670.

<sup>2</sup> Abb. Dig. Corp. 587-588 ; 1 Kyd, 108 ; Ang. & Ames, §§ 187-191 ; 2 Bland Ch. 142 ; *Reynolds v. Commissioners*, 5 Ohio, 204 ; *White Water Canal Co. v. Vallette*, 21 How, 424 ; *Dupee v. Boston Water Power Co.*, 114 Mass. 37 ; 57 Penn. St. 213 ; L. R. 6 Ch. 83 ; 80 Ill. 263.

<sup>3</sup> *Ib.* ; *Hart v. Eastern Union R. R. Co.*, 8 Ex. 116 ; Abb. Dig. Corp. 41 ; *Morawetz*, §§ 174, 175 ; *Taylor*, § 130.

<sup>4</sup> See § 239.

of what it owns. If a suitable building for its business be lawfully purchased, its mortgage given to secure part of the purchase-money is equally lawful.<sup>1</sup> And where a corporation has the right to purchase materials to be worked up in its factories, it may by inference borrow money for that purpose, and may pledge the corporate property as security.<sup>2</sup>

But all this might be a matter of special regulation in the charter; and we frequently find, in England and some portions of the United States, restraints placed by statute upon the alienation of corporate property, especially in the case of religious corporations.<sup>3</sup> A restraint upon the power of alienation may be derived from the form of the instrument prescribed by its charter or by-law.<sup>4</sup> Sometimes the charter provides as to the place where it shall dispose of certain kinds of property; as in the case of the charter of a fire insurance and loan company, which especially empowered the company to take mortgages, but provided that all mortgage sales should be made in the county where the property was situated.<sup>5</sup> Sometimes the instrument must be executed in a particular manner; as where an act of incorporation required the assent of three fourths of the stockholders to make a mortgage.<sup>6</sup> All such requirements, if expressed, must be strictly complied with, or the transaction is likely to fail altogether; although we find the courts disposed to protect third parties in their rights, when construing restraining clauses of this character, and to prevent the transaction from being collaterally impeached.<sup>7</sup> The circumstances under which equity would interfere to restrain a corporation from improperly alienating its property must depend on general principles; but the court would doubtless interpose wherever the alienation was for other than corporate pur-

<sup>1</sup> *Shaver v. Bear River M. Co.*, 10 Cal. 396.

<sup>2</sup> *Fay v. Noble*, 12 Cush. 18; *Uncas Nat. Bank v. Rich*, 23 Wis. 339. See *Phillips v. Winslow*, 18 B. Mon. 431; *Willink v. Morris Canal Co.*, 3 Green Ch. 377.

<sup>3</sup> *Ang. & Ames*, §§ 187, 188; 2 Kent Com. 281; 1 Kyd, 116-162.

<sup>4</sup> *Myatt v. St. Helen's R. R. Co.*, 2 Q. B. 364.

<sup>5</sup> *Fuller v. Van Geesen*, 4 Hill, 171.

<sup>6</sup> *Cape Sable Company's Case*, 3 Bland Ch. 166.

<sup>7</sup> See *Fuller v. Van Geesen*, *supra*; *Ang. & Ames*, § 189; 84 N. Y. 190.

poses.<sup>1</sup> The power to purchase usually implies the power to sell; and the implied power to sell includes the power to bind by a reasonable condition to refund on certain contingencies.<sup>2</sup>

§ 237. **The Same Subject.** — A provision in the charter making the stockholders individually liable for the corporate debts does not affect the right of a corporation to dispose of its property;<sup>3</sup> nor does the fact that proceedings for forfeiting the charter were pending, under a writ of *quo warranto*, or that the charter was just about to expire.<sup>4</sup> But an assignment and transfer of the corporate franchise outright is beyond the power of any corporation under its charter apart from the consent of the State; and a corporation cannot even mortgage its franchise in such a sense as to give the mortgagees a right to foreclose.<sup>5</sup> The practical mode of selling out the franchise is for individuals to dispose of their

<sup>1</sup> Ang. & Ames, § 190.

<sup>2</sup> De Groff v. Linen Thread Co., 21 N. Y. 124.

<sup>3</sup> As to the right to assign if insolvent, see Abb. Dig. Corp. 43-47; Ang. & Ames, § 191; State v. Bank of Maryland, 9 Gill & J. 205.

<sup>4</sup> Cooper v. Curtis, 30 Me. 488; State v. Commercial Bank, 13 Sm. & M. 569. As to liability under by-laws, see Flint v. Pierce, 99 Mass. 68.

<sup>5</sup> See Ang. & Ames, § 191, and Lathrop's *n.*, with cases cited; Commonwealth v. Smith, 10 Allen, 448; Coe v. Columbus R., 10 Ohio St. 372; Morawetz, §§ 535-542, and cases cited; Carpenter v. Black Hawk Mining Co., 65 N. Y. 43; Thomas v. West Jersey R., 101 U. S. 73. Where a railroad corporation assigns the right to use and control its road, it yet remains liable for the infringement by its assignees of a patent right. York R. v. Winans, 17 How. 30. But a distinction is drawn, conformably to the legislative intent, as deduced from the particular charter or the particular class of business in which the cor-

poration is to engage. A legislature may have conferred the right to transfer or mortgage the franchise; and franchises merely appertaining to the use of particular property (such as to build and maintain a turnpike road) may sometimes be presumed to enable a mortgage of such franchise to be made. Morawetz, § 540; Pierce v. Milwaukee R., 24 Wis. 551. But the mortgage of a franchise, so as to carry a special immunity from taxation, should be understood differently. Morgan v. Louisiana, 93 U. S. 217. And as to transferring to a lessee the power of eminent domain, a similar objection applies. 109 Mass. 103. This whole subject, comparatively novel in development, is full of doubt and difficulty, and the only safety appears to be in procuring express legislative sanction. See Morawetz, §§ 535-542; Taylor, §§ 131, 132. The legislature which creates the corporation and grants the franchises, has power to authorize it to sell them. Wilamette Co. v. Bank, 119 U. S. 191.

stock to others and thus give to transferees a controlling interest. And fraudulent transfers, whether made to defeat the insolvent laws, or for the aggrandizement of unprincipled schemers, are not and should not be tolerated under any circumstances.<sup>1</sup>

Furthermore, in the absence of statutes of especial application to corporations, the usual laws relating to the transfer of property and prescribing formalities of execution must be observed; and, in general, the word "persons," in laws relating to the transfer of property, includes corporations.<sup>2</sup>

§ 238. **Right to issue Negotiable Obligations.**—A corporation often becomes a party to negotiable paper, by the signature of its president or other duly empowered agent. If this be done in the transaction of its legitimate business, and as a convenient mode of conducting its affairs, the corporation will be bound.<sup>3</sup> And the note of a manufacturing corporation may be enforced, even though given as a mere accommodation, provided the holder took it in good faith and before maturity without knowledge of this fact.<sup>4</sup> The same general doctrine extends to executing other classes of commercial securities such as coupon bonds; and the payment of all such obligations may be secured by a pledge or mortgage of the corporate property.<sup>5</sup>

But in respect of the right to issue negotiable obligations, the English rule appears to be more strict than the American;

<sup>1</sup> *Bodley v. Goodrich*, 7 How. 277; *Kean v. Johnson*, 1 Stockt. 401; Ang. & Ames, § 191; Morawetz, § 176, and cases cited; *Moss v. Averill*, 10 N. Y. 449, 457. A lease by one common carrier to another of all its property has been held *ultra vires* and void, as an abandonment of its own public duty. *Central Trans. Co. v. Pullman Co.*, 139 U. S. 24. See § 245.

<sup>2</sup> See *State v. Nashville University*, 4 Humph. 157; Ang. & Ames, § 193.

<sup>3</sup> *Ex parte Overend*, L. R. 4 Ch. 460; *Perrine v. Chesapeake, &c. Canal Co.*, 9 How. 172; *Cooper v. Curtis*, 30 Me. 488; *Abb. Dig. Corp.* 119-121.

<sup>4</sup> *Monument National Bank v. Globe Works*, 101 Mass. 57.

<sup>5</sup> *Olcott v. Tioga R.*, 27 N. Y. 546; Morawetz, § 176; Taylor, § 125. But the agent who signs negotiable paper on behalf of the corporation binds only himself individually, unless he signs in due form. *Caphart v. Dodd*, 8 Bush, 584; *Dutton v. Marsh*, L. R. 6 Q. B. 361. And inasmuch as a corporation cannot go beyond the powers specifically granted to it or necessary for carrying those powers into effect, the notes of a railroad company given for the purchase of steamboats are held not enforceable against it.

for while, under the latest English decisions, it is established that a corporation, whose business is of such a character that the issuing of negotiable instruments would be an ordinary incident, as in the case of a bank, has an implied authority to issue negotiable instruments, it is held, nevertheless, that corporations whose business does not ordinarily require such an issue cannot issue such instruments.<sup>1</sup> In most parts of the United States, however, the doctrine is more lax; and various classes of corporations, railways, and manufacturing companies, for instance, are treated accordingly as having by implication the right to issue negotiable instruments for any legitimate purpose.<sup>2</sup>

§ 239. **Right to borrow or raise Money.**—Of the right to borrow, it may be more generally added that private corporations have an implied authority to borrow money and incur debts in the due fulfilment of their legitimate purposes;<sup>3</sup> though only for such purposes in a just and rational sense, and where, moreover, the charter contains no express prohi-

*Pearce v. Madison, &c. R. R. Co.*, 21 How. 441; 6 How. 507.

<sup>1</sup> See *Bateman v. Mid-Wales R.*, L. R. 1 C. P. 499; *Morawetz*, § 178; L. R. 2 Ch. 617. The implied prohibition thus extends to railways; as also to mining, gas, water, cemetery, and various manufacturing associations. See *Morawetz*, § 178, and cases cited.

<sup>2</sup> *Morawetz*, §§ 176-178; *Taylor*, §§ 125-127. Railway companies can issue negotiable instruments in the United States. *Olcott v. Tioga R.*, 27 N. Y. 546; *Railroad Co. v. Howard*, 7 Wall. 412; *Richmond R. v. Sneed*, 19 Gratt. 354; 9 Ind. 359; 27 N. J. L. 221. So may manufacturing companies generally. *Morawetz*, § 178; 35 N. Y. 505; *National Bank v. Globe Works*, 101 Mass. 57; 46 Ala. 98.

Railroad and other corporations in this country have shown great ingenuity of late years in tempting investments of new and peculiar kinds. It is held that a railroad company

may lawfully issue such securities as "deferred income bonds," which can only receive interest after net earnings reach a prescribed point. *Phila. R. v. Stichter*, cited *Taylor*, § 126. But see *contra*, *Taylor v. Phila. R.*, 7 Fed. 386, where such obligations are made "irredeemable."

A railroad corporation having legislative power to issue bonds or lease a road, is allowed by some decisions to guaranty other bonds as incidental to such power. *Taylor*, § 127; *Railroad Co. v. Howard*, 7 Wall. 592.

<sup>3</sup> *Bank v. Breillat*, 6 Moore P. C. 152; L. R. 10 Eq. 311; *Morawetz*, § 171, and cases cited; *Commercial Bank v. N. O. Man. Co.*, 1 B. Monr. 14; 46 Ala. 98; 7 Heisk. 285; *Nelson v. Eaton*, 26 N. Y. 410. The right to borrow includes the right to give a written acknowledgment of indebtedness after the usual form. *Morawetz*, § 171; 77 N. C. 280. Cf. preceding section.

bition of such acts.<sup>1</sup> An express limitation upon the right of borrowing is held to be not necessarily a limitation upon the right of incurring debts in managing the ordinary business of the corporation.<sup>2</sup> But a corporate borrowing, to be legitimate, ought to include some sort of promise to return the principal of the loan sooner or later.<sup>3</sup>

§ 240. **Rule of Eminent Domain applied.** — Corporation property is subject to the right of eminent domain on the part of government, and may be applied even to the extent of extinguishing its franchise to public uses, like that of a citizen, upon the payment of just compensation. No exemption indeed can be claimed from this rule; unless, perhaps, it could be shown that the property had already been applied to a greater or equally beneficial public use.<sup>4</sup> This public right of eminent domain is sometimes delegated in a measure by government, on behalf especially of railroad companies; but the legislature cannot relinquish the right. The statute mode of grant must be strictly followed. No corporation may take private property without the owner's assent, unless the power to do so is given expressly or by necessary implication; the power itself extends only to necessary property for the corporate purposes, and just compensation must be made to the owner at all events.<sup>5</sup>

§ 241. **Visitation of Corporations; Mandamus and Quo Warranto.** — Corporations are subject at the old law to what is called *visitation*. The origin of the visitatorial power is in the property of a donor, and the power which every one has to dispose, direct, and regulate his own property. The internal affairs of ecclesiastical and eleemosynary corporations (the latter term including only schools, colleges, and

<sup>1</sup> *Ib.* See 84 N. Y. 190.

<sup>2</sup> Morawetz, § 172, and cases cited; *Re German Mining Co.*, 4 De G. M. & G. 19. Cf. 4 De G. M. & G. 43.

<sup>3</sup> See 7 Fed. 386; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

<sup>4</sup> The Constitution of the United States does not prohibit this to a State as "impairing the obligations of contracts." Cooley Const. Limitations,

342-344; 24 N. J. Eq. 468; *Philadelphia R. v. Catawissa R.*, 53 Penn. St. 20.

<sup>5</sup> *Canal Co. v. Railroad Co.*, 4 Gill & J. 1; *Thacher v. Dartmouth Bridge Co.*, 18 Pick. 501; 111 Mass. 125, 139; *Abb. Dig. Corp. "Eminent Domain;"* Ang. & Ames, § 192; Morawetz, §§ 459-462; Taylor, §§ 163-166.

hospitals) are usually inspected and controlled by a private visitor.<sup>1</sup> But it is otherwise with civil corporations, whether public or private; for these are subject to the law of the land, and are visited by the government itself through the medium of the courts.<sup>2</sup>

And the method of proceeding where the common-law jurisdiction is to be exercised over civil corporations is by writ of *mandamus* or by information in the nature of *quo warranto*. The writ of *mandamus* is (as the word imports) substantially a command in the name of government, directed to persons, corporations, or inferior courts within the jurisdiction, requiring them to do a certain act as the legal duty of their office, character, or situation; and, though issuing from the common-law courts, it affords a sort of equitable relief. This writ issues only at the discretion of the court to whom the application is made; it is not allowed unless the applicant has a clear legal right, and is without any other adequate or specific remedy for its enforcement; nor will it control discretionary power, but applies to plain dereliction of duty.<sup>3</sup> The object of *mandamus* is to compel corporate officers or the corporation itself to the performance of duties which are owed to the public and third parties in interest.<sup>4</sup>

Writs or information in the nature of *quo warranto* are usually filed, at the present day, by the attorney-general, or in his name *pro forma* by the prosecutor; and proceedings are conducted before the highest court of ordinary jurisdiction. The local practice depends, however, to some extent, upon local statutes. These informations are in form criminal, but in their nature they are civil proceedings.<sup>5</sup> *Quo war-*

<sup>1</sup> 1 Bl. Com. 480; 2 Kent Com. 300-305; Ang. & Ames, §§ 684-696; Dartmouth College v. Woodward, 4 Wheat. 518; Abb. Dig. Corp. 873; Green v. Rutherford, 1 Ves. 462.

<sup>2</sup> *Ib.*; 2 T. R. 385.

<sup>3</sup> Rex v. Dublin, 1 Stra. 538. See more fully Abb. Dig. Corp. 450-453; Ang. & Ames, §§ 700-715; Taylor, §§ 454, 455; and general works on Practice, as to remedy by *mandamus*.

<sup>4</sup> As, for instance, to compel outgoing officers to surrender corporate books; to obtain inspection of such books; to compel a regular transfer of shares; to compel officers to publish periodical reports, or to hold elections, or to call meetings.

<sup>5</sup> Abb. Dig. Corp. 595-600; 2 Kyd Corp. 395, 403; Ang. & Ames, § 730 *et seq.*; 3 T. R. 484; Bac. Abr. Informations, D.; Taylor, §§ 457-460.



*ranto* applies to all sufficient causes for the dissolution of a corporation; though in general an information to dissolve must be prosecuted by the sovereign authority; and among other causes may be enumerated those of impeaching the title to office of some corporate officer or member, and of proceeding against persons who presumed to act as a corporation when in fact no such corporation was ever created. Fines are merely nominal for the most part; and the remedy aims to correct the mischief in each case, according to the circumstances; extending even to a seizure of the franchises, when necessary, and their forfeiture, — no dissolution taking place, however, until execution has followed a judgment of seizure.<sup>1</sup>

As *mandamus* and *quo warranto* are common-law proceedings, it is often said that corporations are amenable only to the common-law courts. Yet, where a charitable or other corporation is chargeable with a trust, chancery may exercise some sort of jurisdiction by virtue of its well-known authority in such matters; and a corporation may be restrained upon equitable grounds on behalf of one or more stockholders or the State in various modern instances,<sup>2</sup> so as to prevent *ultra vires* acts which are in contemplation from being performed.

§ 242. *Dissolution of Private Corporations; how effected.* —

See *Donnelly v. People*, 11 Ill. 552. In this country the ancient writ of *quo warranto* has become practically obsolete; but information in the nature of a *quo warranto* will lie both against corporations having a legal existence for the forfeiture of their franchises, and against such bodies as assume to exercise corporate powers without any authority at all. See § 243, *post*, as to dissolution.

<sup>1</sup> *Commonwealth v. Union Fire, &c. Co.*, 5 Mass. 230; *Rex v. Ogden*, 10 B. & C. 230; *State Bank v. State*, 1 Blackf. 278. See *United States v. Addison*, 6 Wall. 291; *People v. Kankakee Co.*, 103 Ill. 491; *State v. Bick*, 81 Ind. 78. Jurisdiction in

equity has been refused, in a recent Massachusetts case, where the party complained of was a private corporation, whose proceedings had not endangered any public or private rights, and were objected to merely as unauthorized by the act of incorporation and contrary to public policy. *Attorney-General v. Tudor Ice Co.*, 104 Mass. 243.

<sup>2</sup> See 2 Kent Com. 305; Morawetz, §§ 657-659. Thus, misapplication of funds or a violation of charter or illegal voting upon shares is restrained, though a court of equity will not unnecessarily interfere with the management of the corporation. *Ib.* §§ 381-412; *Taylor*, 555, 556, 587.

Now, as to the dissolution of corporations, and its effect upon the corporate property. A corporation may be dissolved, as Chancellor Kent tells us, (1st) by statute; (2d) by the natural death or loss of all or an integral part of the members; (3d) by surrender of its franchises; (4th) by forfeiture of its franchises. And to these an eminent text-writer has added a mode grown to be quite common in this country: (5th) by expiration of its term of duration as limited by charter or general law.<sup>1</sup>

The first mode of dissolution applies rather to England, where an act of Parliament is supreme law, than to this country, where, in conformity to the Constitution of the United States, it has become a settled principle that the charter of a private corporation is an executed contract between the State and the individuals incorporated, which the legislature cannot afterwards repeal, impair, or alter, against the consent or without the default of the corporation judicially ascertained and declared.<sup>2</sup> Since the decision of the Supreme Court of the United States in the great case of *Dartmouth College v. Woodward*, it has become a common and prudent legislative practice in this country to reserve expressly in every important act of incorporation for private purposes the power on behalf of the State to alter, modify, or repeal at pleasure.<sup>3</sup> And a reservation of this sort is frequently to be found in the general statutes;<sup>4</sup> inasmuch as the granting of any corporate right or privilege rests entirely in the discretion of the State as to terms and conditions.

As to the second mode of dissolution, the rule is self-evident where all of the members are dead, leaving no succes-

<sup>1</sup> 2 Kent Com. 305; Ang. & Ames, § 765; 1 Bl. Com. 485; Abb. Dig. Corp. 289-296; Morawetz, § 629.

<sup>2</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518; 2 Kent Com. 306; 2 Kyd, 446; Ang. & Ames, § 767; 1 Bl. Com. 160, 485. But as to public corporations, see *Curran v. State of Arkansas*, 15 How. 304.

<sup>3</sup> *Ib.* And see, as to a private business corporation, *New Orleans v.*

*Houston*, 119 U. S. 265. Such corporations are "persons" not to be deprived of property nor the equal protection of the laws, as State and national constitutions provide. 129 U. S. 26.

<sup>4</sup> See *Commonwealth v. Essex Co.*, 13 Gray, 239; *People v. Oakland Co. Bank*, 1 Doug. (Mich.) 286; *Suydam v. Moore*, 8 Barb. 358; 132 U. S. 75.

sors to supply their places; but not so clearly in case an integral part is gone; for here a corporation is like a natural person, who dies if his head be gone, but might survive the loss of an arm. In other words, the dissolution of a corporation from the loss of an integral part results from the incapacity of the corporation in its imperfect state to act or to restore itself; and the legitimate existence of a part is not always indispensable to a valid election.<sup>1</sup> Furthermore, it has been observed that private corporations aggregate in this country for business purposes are not usually composed of integral parts; for stockholders compose the company, and the directors or managers are only their agents, so that the non-existence of the managers does not suppose the non-existence of the corporation; for which reason a mere failure to elect managers on the regular day would not prevent an election on the next charter day.<sup>2</sup> So, too, as to companies represented by shares of stock, the death of a member passes the title in the shares to some one else; unlike the case of a corporation of purely personal membership.<sup>3</sup>

The third mode of dissolution is by surrender of its franchises; and in this country it is generally admitted that whenever a corporation voluntarily gives up its charter with the assent of the State, and perhaps where it dissolves by assent of its members alone (that of the State being sometimes presumed without a formal acceptance), the corpora-

<sup>1</sup> 2 Kent Com. 309; Ang. & Ames, §§ 768-770; 2 Kyd, 448; Morawetz, §§ 632-635.

<sup>2</sup> Ang. & Ames, § 771; Morawetz, § 633; *Rose v. Turnpike Co.*, 3 Watts, 48. See *Phillips v. Wickham*, 1 Paige, 597; *Pondville Co. v. Clark*, 25 Conn. 97; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle, 9.

<sup>3</sup> Morawetz, § 634; *Russell v. McLellan*, 14 Pick. 69. Discontinuance of business by a business corporation does not dissolve it. And though the organization be discontinued, a new organization may be brought about, and new officers chosen at some later regular meeting. Morawetz, § 635.

Should all the shares be held by one person, the corporation might still exist; for if certain acts under the charter required more stockholders, this owner could transfer some of his shares to another, and so conform to the letter of the rule. *Ib.* § 634. Corporate powers remain for collecting debts, enforcing liabilities, and paying creditors, notwithstanding a non-user. 134 U. S. 533.

Insolvency alone does not dissolve a corporation, possession of property not being essential to the corporate existence. Morawetz, § 636; 10 Gray, 245.

tion is at an end; though it is clear that the officers cannot dissolve a corporation without the assent of the members, nor the majority in general against the will of the minority where an improper object was in view.<sup>1</sup> But trading and manufacturing corporations and those of other classes are expressly authorized in some States to have their affairs wound up on petition to the court of a majority in number or interest; the court, nevertheless, exercising discretion in granting the petition; and this is a most desirable mode of procedure.<sup>2</sup> No universal form of surrender is provided by law; and whether a corporation has been sufficiently dissolved in this manner will depend in each case upon circumstances. A statute of the legislature repealing the act of incorporation would, if passed with the assent of the corporation, suffice for dissolution; but a temporary suspension of the corporate business would not, nor a neglect to choose officers, although a legal surrender may be presumed where the non-user of the corporate franchises has long continued; nor would the mere sale of the corporate property have such an effect.<sup>3</sup>

§ 243. **The Same Subject.**—The fourth mode of dissolution—by forfeiture of the franchises—requires a judicial investigation and decree, by a court of competent jurisdiction, and may originate in a variety of causes; but the decisions in which a forfeiture has been declared are either for mis-user or non-user of the corporate franchises, and all

<sup>1</sup> *Mumma v. Potomac Co.*, 8 Pet. 281; *Ang. & Ames*, § 772; *Norris v. Smithville*, 1 Swan, 164; 2 Kent Com. 310; *Abb. Dig. Corp.* 289; *Smith v. Smith*, 3 Des. Ch. 557.

<sup>2</sup> See *Pratt v. Jewett*, 9 Gray, 34; *N. Y. Rev. Stats.* 466-472; *Herring v. N. Y. R.*, 105 N. Y. 340; *Morawetz*, § 637; *Taylor*, §§ 433, 434.

<sup>3</sup> See 2 *Kyd*, 471; *Ang. & Ames*, § 773, and cases cited; *Abb. Dig. Corp.* 296; *Morawetz*, §§ 637, 638; *Bradt v. Benedict*, 17 N. Y. 93; *University of Maryland v. Williams*, 9 Gill & J. 365; *State v. Adams*, 44 Mo. 570; *Brandon Iron Co. v. Gleason*,

23 Vt. 228; *Brufett v. Great Western R.*, 25 Ill. 353; 2 Kent Com. 311; *Evarts v. Killingsworth Man. Co.*, 20 Conn. 448; *Rooke v. Thomas*, 56 N. Y. 559. Under general enabling statutes for organizing business corporations, a mode of formal dissolution is generally provided. Such formal modes under proper judicial submission are desirable; and yet, as such companies usually sustain no real public duty, and, like individuals, fail often of success without insolvency, dissolution should be simple and easy.

turn upon the principle that a charter is liable to forfeiture whenever the grantees fail to act up to the end or purpose for which they were incorporated.<sup>1</sup> Fraud, collusion, and mismanagement on the part of the stockholders or directors, gross transgressions of the charter in borrowing money or speculating with the corporate funds, fraudulent official statements as to the affairs of the company for imposing upon and deceiving the public, all these may be enumerated as among the instances of mis-user, which justify a judicial forfeiture. As to non-user of the franchises, the rule is of course less strict; and rarely would the charter be forfeited on this account unless some element of mis-user were also present; for in general to work a forfeiture something more than mere casual negligence or honest error must be shown; something more, even, than a slight abuse of the charter privileges which has neither produced nor tends to produce mischief to any one. But the discontinuance of business for an unreasonable length of time would be an instance of non-user calling properly for a decree of forfeiture; if, indeed, a dissolution might not, upon the principle of surrender, be well enough presumed without it.<sup>2</sup> There are a number of cases where high-handed and arbitrary acts on the part of influential officers or members of a corporation have been deemed insufficient for a sweeping forfeiture of the franchises; and certainly the milder methods of judicial correction, as by compelling refractory individuals in power, are preferred wherever available.

The government which created the corporation, and which of course can waive the conditions of a violated charter, must institute proceedings for forfeiture; and the remedy is either by *scire facias*, — the usual process where there is a legally existing corporation, — or by *quo warranto*. Our local statutes, however, affect somewhat the mode of proced-

<sup>1</sup> See Bright. Fed. Dig. Corp. 6 Sm. & M. 618; Abb. Dig. Corp. VIII; Lum v. Robertson, 6 Wall. 296; 2 Kyd, 474; 2 Kent Com. 312; Ang. & Ames, § 774 *et seq.*; State Bank v. State, 1 Blackf. 270; Commercial Bank v. State of Mississippi,

<sup>2</sup> *Ib.* And see Commonwealth v. Commercial Bank, 28 Penn. St. 388; State v. Commercial Bank, 10 Ohio, 535.

ure; the tendency in many States being to commit jurisdiction over the forfeiture of corporate franchises to chancery instead of the common-law courts,—that is, to the highest tribunal of the State in the exercise of its equity, not its common-law functions;<sup>1</sup> since equity has a more flexible discretion for meeting the various controversies which may arise.

The fifth and last mode by which a corporation may be dissolved is by expiration of its term of duration. This term being definitely fixed by its charter or by general law, a complete dissolution takes place when the prescribed limit is reached; and all the usual consequences follow, unless specially provided against. It is beyond the power of the legislature by renewing the charter, afterwards, to revive the corporate debts and liabilities, any more than in the other cases of dissolution already noticed.<sup>2</sup> Charters may be expressly limited by some contingency; but where a forfeiture is threatened upon condition subsequent, or where dissolution *per se* is in doubt, there should be a judicial determination in order to forfeit.<sup>3</sup>

§ 244. **Effect of Dissolution upon Corporate Property.**—The effect of the dissolution of a corporation upon the cor-

<sup>1</sup> *Cooper v. Curtis*, 30 Me. 488; *Ang. & Ames*, §§ 777, 778; 2 T. R. 515; *Morawetz*, § 640; *Terrett v. Taylor*, 9 Cr. 51; 2 Kent Com. 318, 314; *Wilde v. Jenkins*, 4 Palge, 481; 1 Bl. Com. 485; *Abb. Dig.* 289; *Slee v. Bloom*, 5 Johns. Ch. 380. See, as to remedies, *supra*, § 241.

In England, Parliament may dissolve a corporation and deprive it of its franchises against its consent. But in this country, State legislatures are restrained from doing so by the constitutional provision as to impairing the obligations of contracts. *Dartmouth College v. Woodward*, 4 Wheat. 558. See § 240, *supra*.

Among causes deemed sufficient for a judicial forfeiture of corporate franchises are these. Failure to fulfil duties assumed and owing to the

public, 8 R. I. 182; 32 Mich. 248; *Turnpike Co. v. State*, 3 Wall. 210; or obligations imposed for reasons of sound public policy, 45 Wis. 590. For unauthorized exercise of a franchise or total insolvency, see *Morawetz*, §§ 639-655 and cases cited; *Taylor*, § 432.

As to the common-law or chancery procedure in such cases, see *Morawetz*, §§ 656-659; *Ang. & Ames*, §§ 731-765, 778; *High's Extraordinary Legal Remedies*, §§ 591-761.

<sup>2</sup> *Ang. & Ames*, § 778; *Bank v. Lockwood*, 2 Harring. 8; *Bank of Mississippi v. Wrenn*, 3 Sm. & M. 791; *Morawetz*, § 630; *People v. Walker*, 17 N. Y. 502; *La Grange R. v. Rainey*, 7 Coldw. 482; *Matter of Brooklyn R.*, 81 N. Y. 69.

<sup>3</sup> *Ib.*; *Morawetz*, § 631.

porate property differs according to whether that property be real or personal. The theory of the common law is that, upon the dissolution or civil death of a corporation, all the real estate remaining undisposed of reverts to the original grantor or his heirs, while the personal property vests in the sovereign granting the charter,—in England the king, in this country the people. The debts due from the corporation are extinguished altogether, and the suits of creditors already pending fall to the ground.<sup>1</sup> But this rule, which was tolerable only so long as few trading corporations existed and none were dissolved, has long since become obsolete; and by means of statutes, and the interposition of the chancery courts, these mischievous consequences are now, for the most part, avoided. In England insolvent or dissolved moneyed corporations have not been practically subjected to this species of wholesale confiscation; and our own tribunal of last resort declares that a statute distributing the property of such a corporation amongst its stockholders, or giving it to a stranger, or seizing it to the use of the State, would as clearly impair the obligation of contracts as a law giving to heirs the effects of a deceased natural person to the exclusion of his creditors.<sup>2</sup>

Equity relieves at the petition of stockholders and creditors against the inequitable consequences of a dissolution; and the legislature may reserve the assets, in any special case, so as to enforce the liquidation of outstanding claims, or, as is frequently the case, may pass general statutes for that purpose.<sup>3</sup> In effect, the prevailing rule in this country is,

<sup>1</sup> Co. Lit. 13 b; 1 Bl. Com. 484; 2 Kyd, 516; Morawetz, § 660; Abb. Dig. Corp. 296; 2 Kent Com. 307; Ang. & Ames, §§ 196, 779. The consequences of a dissolution are both substantial and formal. The substantial consequences are that the business is wound up, and all the legal relations subsisting in respect of the corporate funds are liquidated. The formal consequences are that the corporation can no longer act as such either before the courts or

in business transactions. Taylor, § 435; National Bank v. Colby, 21 Wall. 614.

<sup>2</sup> Curran v. State of Arkansas, 15 How. 312; Bacon v. Robertson, 18 How. 480; 2 Kent Com. 307, n.; Ang. & Ames, § 779 and cases cited; Lincoln v. Fitch, 42 Me. 456; Abb. Dig. Corp. 298.

<sup>3</sup> See Pomeroy v. Bank of Indiana, 1 Wall. 23; Nevitt v. Bank of Port Gibson, 6 Sm. & M. 513; Robinson v. Lane, 29 Ga. 337.

that upon the dissolution of a business corporation its effects are a trust fund in equity for the payment of creditors, who may follow them into the hands of any one not a *bond fide* creditor or purchaser without notice; all rights under the defunct corporation are fixed at its dissolution; and the corporation has a sort of nominal existence for the purpose of closing its concerns after the manner of administration upon the estate of a deceased individual.<sup>1</sup>

To avert the common-law consequences of a dissolution more completely, the statutes of many of the States now provide, at length, for the winding up of dissolved companies, the collection of assets, the liquidation of debts, and the just distribution of the corporate assets.<sup>2</sup> Directors who carry on the business after the legal dissolution of the corporation and before its affairs are finally wound up, are bound to account for the proceeds of such business.<sup>3</sup>

#### § 245. Consolidation or Amalgamation of Private Corpora-

<sup>1</sup> Crease v. Babcock, 23 Pick. 334; Curran v. State of Arkansas, 15 How. 312; Bacon v. Robertson, 18 How. 480; Ang. & Ames, § 779; Morawetz, §§ 662-664; Pomeroy v. State Bank, 1 Wall. 23.

Just before the dissolution takes place, the corporation may assign to a trustee, for the benefit of the stockholders, the corporate property, or through its proper officer indorse over the unpaid paper; and thus enable the trustee to sue in his own name and distribute the effects, notwithstanding a dissolution, to those who occupy more properly than the State the position of next of kin to this artificial being; for our policy is to give stockholders all the distributive balance. Ingraham v. Terry, 11 Humph. 572; Cooper v. Curtis, 30 Me. 488; Folger v. Chase, 18 Pick. 66. And see Lum v. Robertson, 6 Wall. 277. But notwithstanding the charter had expired because of forfeiture or otherwise, a corporation was made liable under our recent national bankrupt act (now repealed)

in the United States courts; so that, if the corporation were bankrupt, its property would be taken wherever found, even in the hands of a State receiver, and made subject to distribution among creditors accordingly. The bankrupt law of 1867 explicitly declared that, whenever any corporation shall be declared bankrupt, all its property and assets shall be distributed to the creditors of the corporation in the manner provided with respect to natural persons. See Bankruptcy Act of 1867; § 37; Bump's Bankruptcy, 1, 421; Thornhill v. Bank of Louisiana, 3 Bank. R. 110. And see Warrant Finance Co.'s Case, L. R. 4 Ch. 643, as to the English practice.

<sup>2</sup> Morawetz, § 665 and cases cited; Folger v. Chase, 18 Pick. 66; Mariners' Bank v. Sewell, 50 Me. 230; 39 N. H. 435; Ramsey v. Peoria Ins. Co., 55 Ill. 311; 48 Ala. 346. And see Mason v. Pewabic Co., 133 U. S. 50.

<sup>3</sup> 133 U. S. 50.



tions; **Secession.** — The legislative union or merger of two corporate bodies in one new one is termed in this country “consolidation,” the corresponding word used in England being “amalgamation.” The subject is a comparatively novel one in our courts as yet. The amalgamation or consolidation of corporations cannot be accomplished unless by express grant of the legislature or necessary implication; since the delegation of corporate powers by one company to another is not within its ordinary functions nor included among the objects for which it was created. Furthermore, the consent of the stockholders of each corporation is generally required in this country to complete the act of consolidation.<sup>1</sup> The effect of consolidation, when accomplished, is to confer the united powers upon that corporation which takes the name of the consolidated company; also to transfer the debts as well as the assets of the old corporation, unless otherwise specially provided against.<sup>2</sup> Nevertheless, the question resolves itself largely into the construction of the legislative act.<sup>3</sup> Railroad companies frequently seek to consolidate in these days for the purpose of bringing a large transportation route under one management; but we must here distinguish between that which constitutes a legal consolidation or amalgamation of corporations and the mere connection of continuous routes by lease or otherwise, as common carriers.<sup>4</sup> Common carriers once more owe a duty to the

<sup>1</sup> *Canal Co. v. Fulton Bank*, 7 Wend. 412; *Morawetz*, §§ 533, 543–566; *Fisher v. Evansville, &c. R. R. Co.*, 7 Ind. 407; *Bishop v. Brainerd*, 28 Conn. 298; *Railroad Co. v. Georgia*, 98 U. S. Supr. 359; 95 U. S. Supr. 319; 49 Ill. 349; *Kean v. Johnson*, 1 Stockt. 401; *Chappell's Case*, L. R. 6 Ch. 902. If a corporation has been consolidated with others under a law which continues all its liabilities, an action commenced before the dissolution is not thereby abated. *Baltimore R. v. Musselman*, 2 Grant, 848.

A corporation formed by the con-

solidation of several companies under the laws of different States is treated within each State jurisdiction as though a corporation of that State. See *Muller v. Dows*, 94 U. S. 447; *Sage v. Lake Shore R.*, 70 N. Y. 220; *Quincy Bridge Co. v. Adams*, 88 Ill. 619.

<sup>2</sup> *Robertson v. City of Rockford*, 21 Ill. 451. See Abb. Dig. 202; *supra*, § 282.

<sup>3</sup> See *Morawetz*, §§ 543–566, and cases cited; *Taylor*, § 403 *et seq.*

<sup>4</sup> See 2 Redf. Railw. 3d ed. 656; *Pearce v. Madison R. R. Co.*, 21 How. 441.

public which they are not permitted to abnegate at pleasure; and it is well settled that a railroad company cannot sell or lease its entire property and franchise to another corporation without express authority of law.<sup>1</sup> Nor is a corporation in debt permitted to transfer its entire property by lease or otherwise so as to prevent the application of the property to the satisfaction of its own debts.<sup>2</sup>

The secession of corporations, too, gives rise to legal controversies; and the rule is that, where any portion of the members secede and erect a new corporation, the corporate property will not be transferred and distributed in consequence, but, in the absence of mutual stipulations to the contrary, will remain with the old corporation.<sup>3</sup> The best test for determining which of the two divisions represents the legitimate succession in a case of this sort is to ascertain which one has maintained the regular forms of organization throughout.<sup>4</sup>

§ 246. **Revival of Private Corporations.** — It remains only to say a few words concerning the revival of a corporation. Mr. Justice Story says that it is true that a corporation may retain its personal identity, although its members are perpetually changing; for it is its artificial character, powers, and franchises, and not the natural character of its members, which constitute that identity; and that for the same reason corporations may be different, though the names, the officers, and the members of each are the same.<sup>5</sup> The same sovereign power which created the original corporation may, after its dissolution, revive or renew the old corporation or create a different one in its place; and the revival of an old corporation may be either with the old or a new set of corporators, and with the old powers alone, or the superaddition of new powers.<sup>6</sup> The question whether a new corporation

<sup>1</sup> Central Trans. Co. v. Pullman Ames, § 194; North Hempstead v. Car Co., 139 U. S. 24; 181 U. S. 371. Hempstead, 2 Wend. 135; Smith v. The same reasoning applies to corporations generally. Ib. Swormstedt, 16 How. 288.

<sup>2</sup> Chicago R. v. Third Nat. Bank, 184 U. S. 276.

<sup>4</sup> Kerr v. Trego, 47 Penn. St. 292.

<sup>5</sup> Bellows v. Hallowell Bank, 2 Mass. 43.

<sup>6</sup> Abb. Dig. Corp. 818; Ang. & Ang. & Ames, § 780; 3 T. R.

is thus created or an old one revived is an important one ; for in the latter case all the rights and responsibilities of the old corporation become renewed, while in the former case this would be impossible.<sup>1</sup> All this is a matter of statute construction for ascertaining the legislative intent ; and we may add that an old corporation may be as well revived under a general law as a special charter.<sup>2</sup> A dissolved corporation is not to be renewed or revived without the consent of the corporators ; for no charter is a matter of legislative compulsion.<sup>3</sup>

§ 247. **Summary as to the Kinds of Ownership in Personal Property.** — We have thus endeavored to place before the reader, in this and the three preceding chapters, the number and connection of the owners of personal property ; pursuing a plan similar to that which our common-law writers are wont to apply to real estate. We have shown that personal property may be rightfully held for beneficial enjoyment, not only *in severalty* (or by a single individual in his own right), but by *joint owners* and *owners in common*, corresponding in the main to the joint tenants and tenants in common of lands and tenements ; by *partners*, whose facilities for managing the property together and carrying on business with it so as to buy, sell, and make profit, are far greater than those of either joint or common owners, and who, besides, enjoy their respective interests without being subject to that awkward condition of survivorship which renders the estate of joint owners so precarious ; by members of a *limited partnership* or of a *joint-stock company*, who seek to invest capital in business without themselves incurring the extensive responsibility of ordinary partners ; by *ship-owners*, whose peculiar rights and liabilities are to a great extent controlled by commercial usage ; and, finally, by members of a *corporation*, that fictitious being of statute law and complete image of

241 ; 2 Kyd, 516 ; Abb. Dig. Corp. 816-819 ; Morawetz, §§ 566, 666.

<sup>1</sup> *Ib.* ; *Smith v. Chicago, &c. R. R. Co.*, 18 Wis. 17 ; *Union Canal Co. v. Young*, 1 Whart. 410.

<sup>2</sup> *Miller v. English*, 1 Zab. 317. See *Low v. Conn. River R. R. Co.*, 46 N. H. 284.

<sup>3</sup> *Morawetz*, § 666 ; *People v. Manhattan Co.*, 9 Wend. 381.

State sovereignty, which furnishes in a compact organization, in the power of perpetual succession, and in a responsibility for the individuals composing it diminished to the lowest practicable point, the greatest advantages for combining the means of many for special and profitable investment and enterprise in trade, commerce, and the arts. In all of these cases the ownership of each individual in the combined personalty is on the same footing, and their rights and liabilities coexist at the same time, all, however, in due proportions.

But property in things personal may, in another sense, belong to two or more at the same time ; that is, where the right to the thing itself is separated from its rightful possession; as, perhaps, in the case of an agent (though theoretically an agent simply represents another), and certainly where a bailee of goods engages in transporting them for the true owner, or otherwise acquires a temporary right. Here a different principle of law applies, which would more properly be considered under the head of title to things personal, and which we shall, in fact, consider hereafter in other volumes ; since unity of ownership in the same degree is our present topic of discussion. Indeed, there may be partners or corporations concerned in a bailment or agency and having the immediate possession to goods, as well as partners or corporations with whom is the ultimate right of ownership or the right of property therein ; and joint trustees frequently hold property for the benefit of heirs and legatees whose interests are joint or common, according to the terms of the will or other instrument which created the trust.<sup>1</sup>

<sup>1</sup> Upon the subject of American private corporations the reader is referred at length to Angell and Ames on Corporations, a work long ago written, but still annotated by other editors in recent editions ; also to the fresher work of Mr. Victor Morawetz on the same subject, issued in 1882, and a still later work by Mr. Henry O. Taylor. There are various digests, such as those of the Messrs.

Abbott ; besides treatises on the law of special corporations, such as the late Judge Redfield's extensive work on Railways, and that of Judge Dillon on Municipal Corporations. All of these are American works, and in this country the business of private corporations takes a wide development, and gives rise to much controversy in the courts.

## CHAPTER XII.

## INCOME, INTEREST, AND USURY.

§ 248. **Usufruct or Income of Personal Property; General Remarks.** — Personal property, like real estate, has its appropriate usufruct, capable of being reduced to a money valuation. Some chattels, to be sure, are naturally consumed in the use; provisions, food, drink, and garments, for instance; while others, not strictly of that class, wear out or deteriorate so quickly as to yield little or no perceptible return apart from an exhaustion of the thing. Of salaries, annuities, pensions, and the like, one often says that they are mere income; meaning that, at all events, their payment continues periodically for a time, as though for one's current needs and benefit, and then must fail altogether. Patents and copyrights yield likewise only a periodical return during the term of the statute monopoly. Yet the usufruct of personal property is in most other instances of distinct appreciable value as compared with capital, and familiarly taken into account by business men as a certain percentage in value of the principal or thing itself, enhancing the market value of the latter accordingly. Animals of various kinds yield a profit not only in the labor they perform, the exhibition they afford, or their valuable products, but through the propagation of their own species, which is a peculiar source of emolument. Ship-owners derive periodical profit from the vessel by transporting or letting it for transportation; and a vessel, though wearing out in time, may yet outlast many a house, yielding meanwhile a recompense corresponding to a rental. Partners and business men generally expect, by turning over their personal capital, to gain periodical profits, while the profits of a stock company's business are regularly declared as dividends among the shareholders. All prudent

men, indeed, having capital in a civilized community, seek to invest it so as to derive a good and regular income; and for such purposes, personal property may be found not less desirable than real. In the present age, moreover, safe investments are made in the well-secured debts, so to speak, of others, or so as to supply the monetary needs of enterprising men of a community, or of the State itself. These debts, represented by bonds or commercial paper, are payable with periodical pecuniary return to the lender and at least a reciprocal theoretical advantage to the borrower himself. In our courts of equity, questions as to the safe investment and reinvestment of trust funds in personal property are constantly arising, and the respective interests of beneficiaries regarding capital and income are carefully considered.<sup>1</sup>

The statement of these truths, perhaps truisms, may properly preface an exposition of the law of usufruct with especial reference to the two kindred and familiar topics of interest and usury.

§ 249. **Origin of the Practice of taking Recompense on Loans; Primitive Ideas as to Interest and Usury.** — When real estate is let by the owner to some stranger, the one loses for the time being his beneficial enjoyment of the premises, while the other gains it; and accordingly such a sum is made payable by the latter to the former as may have been agreed upon, by way of recompense, which is known as rent. Now, as to personal property, a specific chattel is often loaned by the owner, the borrower paying a sum for the use of it which he is supposed to make good by his own profits, or the enjoyment he derives from the thing, so that practically he reimburses himself for such a payment. In a cultivated age money becomes the medium of exchange; and so, instead of hiring chattels, men in the course of their business find it convenient to borrow money or cash as an equivalent or the means of procuring other kinds of property, upon which loan they hope to derive some enjoyment or profit. Whether it be land or some specific chattel, or that medium of exchange which represents them all, there is one party who gives up

<sup>1</sup> See *supra*, c. VII.

the temporary use of his own property, and another who takes that use and renders an equivalent in return.

This statement of the transaction between borrower and lender in its simplest form may aid the reader towards reaching just conclusions on a subject which has greatly disturbed the legislators and statesmen of every century. Wise men of a primitive age, who would not scruple to take compensation for the hire of their cattle or the occupation of their lands, have regarded with horror the thought of paying correspondingly for the use of that which might purchase both. This was, doubtless, partly because of the peculiar and hidden characteristics which money possesses, although in truth a species of property; and, on more general considerations, because of the jealousy with which the poor man, the embarrassed debtor, and the toiler must always regard the capitalist. The Mosaic law denounced the letting of money upon usury, and yet Jews have become the greatest usurers of modern times. Ancient Rome discouraged and for a time abolished the same practice, but in the age of Roman commerce it necessarily revived and extended. Many of the fathers of the primitive Christian church considered it sinful to lend money on compensation, and the canon law of the Middle Ages was to the same effect; and, before the time of Henry VIII., the common law and statute law of England made the taking of recompense under these circumstances not only unlawful, but an offence visited with very severe penalties.<sup>1</sup> Yet in mercantile England of to-day, wealthy and prosperous, and in our own land too, wherever and whenever there is a nation of intelligent capitalists, whether Jew, Christian, or Pagan, we find them loaning upon some rate of compensation, or not loaning at all.

§ 250. **The Same Subject.**—The reason why money or its equivalent yields to the lender, when left free and uncontrolled, some percentage of compensation is that common sense and the justice of the thing demand it. A man might as well be expected to give houses and lands rent free, or to put stock into a business where he was sure of making no

<sup>1</sup> See Encycl. Am. "Usury;" Blydenburgh on Usury, 1-3.

profit and might lose the whole of it, as to hazard money by loaning it to a stranger and hope for nothing in return but the capital he advanced. The laws of trade exact compliance with this reasonable rule of requiring interest to be paid upon the principal sum advanced ; and if legislation be stringent and obstructive in this respect, various shifts and devices are found for evading the legal penalties against usury ; and since men must and will borrow for their purposes, whatever be the cost, the practical consequence inevitably ensues that the prevailing rate advances in proportion to the extra risk of loss and punishment which the lender encounters. Contempt for the law follows upon contemptible legislation. It is only in countries where trade is hopelessly stagnant, or borrowers alone make the laws, that we may ever expect to find illiberal notions prevailing in this matter of interest and usury. The moment capitalists and lenders have their voice in the administration of affairs, despite the jealousy with which the poor must always regard the wealthy, the right to charge for the loan of their funds is sure to be promptly conceded to them.<sup>1</sup>

§ 251. **Modern Legislation distinguishing Interest and Usury.**— Thus far, then, have we emphatically progressed, that in England and the United States persons are no longer forbidden to lend money upon a recompense. But we have stood in both countries upon a technical distinction which the statutes commonly make between *interest* and *usury*. That compensation which is paid by a borrower to a lender, and generally by one indebted to his creditor, for the use of money, is at this day called interest, provided the rate be a

<sup>1</sup> The usury laws of Rome were doubtless founded in heathen policy. But as legislators in England and the United States have been largely influenced in opposing interest or usury by arguments drawn from the supposed prohibitions of the Holy Scriptures (or rather of the Mosaic code), it might be well to call attention to that familiar parable of the servants with the talents, which so many of

the over-scrupulous Christians appear to have overlooked ; where the folly of the man who buried trust money in a napkin, instead of placing it where it would have gained "usury" for the owner was rebuked (see St. Luke xix. 23). It is rather the extortion of greedy and avaricious capitalists which the Scriptures condemn than any universal practice of taking interest for the loan of money.



legal one and conform to the law ; while such compensation, if in excess of the legal rate, is stigmatized as usury, and of course is attended with the legal penalties, whatever these may be. But for such statute limitations, interest and usury would be correlative terms, since no one could take compensation at all ; and as every State has its own usury laws, we find different rates of percentage established, theoretically based upon the demands of trade, though in many localities falling far short of these demands and subject to constant evasion. In some States the legal rates of interest rise as high as ten, or, by special contract, even twenty per cent, in others it has been as low as five per cent ; but the "lawful rate" usually prevailing is and has been in this country what it remained in England for more than half a century previous to the passage of the Statute of Anne in 1713 ; namely, six per cent.<sup>1</sup> So frequently are the usury laws modified in these later times, — though, for obvious reasons, not so rapidly as the wants of a mercantile community call for a change, — that to attempt to find any moral basis upon which to predicate the statutory offence seems hardly possible ; and it can only be said that he who transcends the arbitrary rates established by a local legislature is technically a taker of usury instead of interest, and becomes a victim to the penalties of the law, which in some jurisdictions are very stringent.

The latest policy, however, in England and America is towards the complete abolition of interest and usury laws, so as to leave parties who stipulate for a loan free to regulate their contracts according to their own wishes ; and in effect, to establish a free trade in money, allowing the mercantile law of supply and demand to regulate the standard of interest rates, uncontrolled by government. By an act passed in England on the 10th day of August, 1854, all the laws against usury in that country are repealed. But where interest is now payable upon any contract, express or implied, for payment of the legal or current rate of inter-

<sup>1</sup> See Bouv. Dict. "Interest," "Usury;" Blyd. Usury, 1-3; Stat. 12 Anne, c. 16.

est, or where interest is payable by any rule of law, the same rate is recoverable as before the act.<sup>1</sup> In this country, too, there are several States (and their number is likely to increase rapidly) whose legislatures adopt the plan of leaving a "legal rate" as before for ordinary transactions, while permitting parties to stipulate in writing for any different rate they please; or else, when inclined to be somewhat more conservative, permitting written stipulations to be for any different rate not exceeding another rate, say that of ten per cent.<sup>2</sup>

<sup>1</sup> Stat. 17 & 18 Vict. c. 90; Wms. Pers. Prop. 5th Eng. ed. 89. See *Aylesford v. Morris*, L. R. 8 Ch. 484; *London R. v. South Eastern R.* [1893], App. C. 429.

<sup>2</sup> One of the most liberal of these American statutes is that which went into effect in Massachusetts on the first of July, 1867. See Mass. Acts 1867, c. 56. See also Act 1870, and Mass. Pub. Stats. c. 77, § 3. And see summary of State interest laws, in Bouv. Dict. "Interest." And in other ways, such as the mitigation of severe statute penalties against the offence of usury, the progress of an enlightened public sentiment on this subject is plainly perceptible.

It is as yet too early to judge of the probable result of these new experiments in usury legislation. While, in the main, parties who are left free to make their own bargains learn speedily what is for their mutual advantage, it is doubtless a legitimate province of the legislature to guard those who are peculiarly exposed to a creditor's oppression and extortion. But while incompetent parties should be thus protected against their contracts generally, any attempt of the public to interfere, not on behalf of a careless and improvident class of private individuals, but with reference to a class of private transactions in which the most shrewd and intelligent might engage

on either side as well as the timid and inexperienced, certainly appears dangerous. To be sure, capitalists have done business so long with this noose of statutory penalties dangling above their heads, that they might well cease to feel humiliated; yet it might have been asked why were they thus singled out, when the grocer who supplies the poor man's family with necessities, and the landlord who gives them a shelter, are permitted to name their own price. It is said that Solon, in the laws which he gave to the Athenian republic, allowed parties to regulate the rate of interest by their own contracts. This, however, we are told, is the only known exception to the universal practice among the civilized nations of ancient times, where the taking of interest was permitted at all, — namely, of drawing a distinction between legal and illegal rates, and punishing those who overstepped the mark; and a distinguished scholar of modern times states that, even among the Athenians, usage fixed the rate of interest at twelve per cent in certain cases, and at eighteen per cent in others, and that the public voice cried out against all who did not conform to this usage, — as, indeed, it might. De Pauw. Rech. ; Phil. 5, § 2; Blyd. Usury, 3-5, and authorities cited. In Rome all sorts of experiments

§ 252. **Interest and Usury to be considered in Order.**—With the preliminary caution to the reader that he stands upon doubtful ground, we proceed, then, to consider the leading doctrines of the English and American courts touching this much controverted subject of interest and usury; first treating of interest, or that rate for the use of money which falls within the local statute, and then passing to usury, or the rate which falls without the statute and is illegal.

§ 253. **As to Interest; When payable on Contracts.**—

I. Concerning the payment of interest, it may be stated in general that interest is payable whenever by express agreement between themselves the parties have stipulated that it shall be paid by the one to the other. Any express promise of this sort is usually, though not always, expected to be in writing. Interest is likewise allowed where, from the course of dealings between the parties, a promise to pay interest is implied. And hence it may be generally said that interest as incident to a debt is founded upon the agreement of the parties, express or implied.<sup>1</sup> Thus, an agreement to pay

were tried: at one time there were no laws against usury; at another time interest was not allowable at all; but in the time of Justinian rates were established within liberal limits, while the practice of taking more exorbitant interest was punished. Blyd. ib. We must then admit that the lessons of human experience are, on the whole, against free trade in money, and favor establishing rates within more or less liberal limits; though the consequence we should prefer to take—so different are the modern from the ancient methods of trade and commerce, not to add of social discipline—is that of learning some lessons from our own experience. The real problem to be tested, as it appears to us, is whether or not the lender of money occupies so advantageous a position with reference to the borrower that it becomes unsafe to

allow the two to regulate their own transactions with one another. Let money go freely into the market and competition be open, and if it then appears that capital commands rates far beyond its worth, and in fact exorbitant, we have little doubt that public sentiment will soon react in favor of the old interest laws and penalties against usury. The present experiment will best be judged by its own fruits. To the date of revising this statement (1896), the free-trade experiment appears to have worked so well in Massachusetts, if not other jurisdictions, that no attempt to return to the old system is likely to succeed.

<sup>1</sup> See Bouv. Dict. "Interest;" Jones v. Mallory, 22 Conn. 386; Hitt v. Allen, 13 Ill. 592; McLaughlin v. Sauvé, 13 La. Ann. 99. The law of England does not allow interest except by statute or contract,

interest may be inferred from a course of dealing between the parties, where interest has been charged and allowed before under the like circumstances.<sup>1</sup>

Mercantile usage is a good ground upon which to charge interest; by which we mean usage in the particular locality and with reference to the particular class of transactions under which the question of interest payment arises.<sup>2</sup> And as usage bears in the direction of an implied contract, we may add that the custom of a creditor to charge interest which has not been brought home to the debtor will not, of itself, authorize the recovery of interest.<sup>3</sup> Nor, of course, can mercantile usage avail to alter the express agreement of the parties in this respect.<sup>4</sup>

In the matter of debts, something is usually deemed essential between the parties to fix a time certain for payment; and interest does not begin to run, in the absence of their agreement, before this time certain has arrived. But where a party stipulates to pay a fixed sum by a certain day, and fails to do so, interest is chargeable against him.<sup>5</sup> As to debts generally, interest is not recoverable where there is no presumption that the debt should have been paid sooner; and upon an unliquidated or open or disputed account, no

or the law merchant. *Gosman, Re*, 17 Ch. D. 771. Or by way of award as damages for the wrongful withholding of money. *Webster v. Life Assurance Society*, 15 Ch. D. 169.

<sup>1</sup> *Esterly v. Cole*, 3 Comst. 502; *Carson v. Alexander*, 34 Miss. 528. But an action will not lie to recover interest some time after the principal has been paid and accepted, on any implied contract. *Abbott v. Wilmot*, 22 Vt. 437; *Robbins, & Co. v. Brewer*, 48 Me. 481.

Interest, it is held, continues to run in time of civil war on debts due from a citizen of one belligerent to a citizen of the other. *Spencer v. Brower*, 32 Tex. 663. See *Ward v. Smith*, 7 Wall. 447; *Bean v. Chapman*, 62 Ala. 58. The running of

interest upon debts is not suspended as between citizens of the same belligerent. *Williams v. State*, 37 Ark. 463.

<sup>2</sup> *Watt v. Hoch*, 25 Penn. St. 411; *Ayers v. Metcalf*, 39 Ill. 307; *Veiths v. Hagge*, 8 Clarke, 163; *Esterly v. Cole*, 3 Comst. 502; *Fisher v. Sargent*, 10 Cush. 250.

<sup>3</sup> *Rayburn v. Day*, 27 Ill. 46.

<sup>4</sup> *Keener v. Bank of United States*, 2 Penn. St. 237.

<sup>5</sup> *Stevenson v. Maxwell*, 2 Sandf. Ch. 273. Payment promised upon a future contingent event is not at a time certain; and a suitable demand should be made before the sum can carry interest. *London R. v. South Eastern R.* [1893], App. C. 429.

such presumption arises. It is otherwise, however, on an account stated or other liquidated sum, whenever the debtor knows precisely what he is to pay and when he is to pay it; and here interest is usually recoverable.<sup>1</sup> Where no time certain is fixed for payment of a debt, the creditor may make it certain by a demand of payment, or something equivalent; and interest will then begin to run from the time such demand was made, unless the debtor had sufficient excuse for delaying longer. Any unliquidated claim for service rendered requires a demand showing what is claimed, in order to set interest running.<sup>2</sup> Demand having been properly made, the debtor is in default if he neglect to pay; and hence it may be said that the debtor's default in the payment of what is due is a good reason for claiming interest from the time of his default.<sup>3</sup> But upon a running account and before a final computation of balances between the parties, there is usually no default, and consequently no interest payable.<sup>4</sup> The presentation of a bill or account with the balance struck is a frequent method of demand. Where a definite credit is agreed on, interest is calculated from the expiration of the credit.<sup>5</sup> And a single cash sale will bear interest immediately upon a delivery of the goods.<sup>6</sup> Mercantile usage, however, goes far towards controlling this whole subject; and each case must depend to a considerable degree upon its own merits, reasonable delays being excused, and our business usage seeming to sanction the idea that where a bill is sent to a customer for a debt or balance struck, no interest shall be computed in addition

<sup>1</sup> See Bouv. Dict. "Interest;" 2 Burr. 1086; McClintock's Appeal, 29 Penn. St. 360; Brainerd v. Champlain Trans. Co., 29 Vt. 154; Davis v. Walker, 18 Mich. 25; Esterly v. Cole, 8 Comst. 502; Crosby v. Mason, 32 Conn. 482. See Vaughan v. Howe, 20 Wis. 497.

<sup>2</sup> Soule v. Soule, 157 Mass. 451; Farr v. Semple, 81 Wis. 230.

<sup>3</sup> See Evans v. Beckwith, 37 Vt. 285; Maxey v. Knight, 18 Ala. 300;

Adams v. Fort Plain Bank, 36 N. Y. 255.

<sup>4</sup> This does not prevent parties from expressly stipulating for interest as items are entered. 65 Vt. 160.

<sup>5</sup> See Casey v. Carver, 42 Ill. 225; David v. Conard, 1 Iowa, 336; Bate v. Burr, 4 Harring. 130.

<sup>6</sup> Parke v. Foster, 26 Geo. 465; Foote v. Blanchard, 6 Allen, 221; Waring v. Henry, 30 Ala. 721.

unless upon some express claim or warning to the creditor, or when payment is vexatiously dilatory and dunning, or a suit becomes needful.

§ 254. **The Same Subject.** — As instance of the foregoing rules, the loss on a policy of insurance, if payable at a time expressly fixed, will bear interest presumably from that time.<sup>1</sup> Where the contract is to pay after so many days' notice, interest would not be payable until after the expiration of that period.<sup>2</sup> On money due for labor, interest may be recovered after a demand of payment made at the expiration of a reasonable time.<sup>3</sup> And on cash advances interest is usually allowable from the date of such advance.<sup>4</sup> But in ordinary cases, where there is no express promise to the contrary, a party should not generally be made liable for interest before maturity of the debt, or until he becomes in some manner put in default for not paying the principal.<sup>5</sup> A debtor may, however, under extreme circumstances, be at fault by neglecting to ascertain the amount of his indebtedness; so that his mere readiness to pay will not always suffice to absolve him from interest.<sup>6</sup>

§ 255. **Rule as affected by Statutes permitting a Higher Rate of Interest.** — Where the law allows parties to establish a higher rate than the regular legal or statute rate of interest, and they make a contract stipulating for payment at the higher rate on a day certain, it would appear from some eminent English and American authorities that, on default of payment, the rate fixed by statute in the absence of contract, and not the higher rate, continues from the day when payment was due, unless the contract was explicit in that respect or some new understanding is created.<sup>7</sup> But on this

<sup>1</sup> Peoria, &c. Ins. Co. v. Lewis, 18 Ill. 553; Swamscot Machine Co. v. Partridge, 5 Fost. 369.

<sup>2</sup> See Cruikshank v. Comyns, 24 Ill. 602.

<sup>3</sup> Ford v. Tirrell, 9 Gray, 401.

<sup>4</sup> Field v. Burnam, 3 Bush, 518; Grimes v. Hagood, 19 Tex. 246. But see Hubbard v. Charlestown Branch B. R. Co., 11 Met. 124.

<sup>5</sup> Gay v. Gardiner, 54 Me. 477; Hollingsworth v. Hammond, 30 Ala. 668.

<sup>6</sup> See McMahon v. New York, &c. R., 20 N. Y. 468; Hummel v. Brown, 24 Penn. St. 810.

<sup>7</sup> Brewster v. Wakefield, 22 How. 118; Ludwig v. Huntzinger, 5 W. & S. 51; Cook v. Fowler, L. R. 7 H. L. 27.

point the authorities are somewhat in conflict, and a decision might turn upon the interpretation of a local statute or of the particular contract. The well-considered determination of the Massachusetts courts favors the opposite construction, and relaxes as against the lender; in other words, where a contract stipulates a certain rate of payment, such rate continues until payment or judgment; and such is the rule lately announced of many other States.<sup>1</sup>

Conformably to the tenor of most legislation upon this subject, the inference is, in absence of express stipulation, that only the regular statute rate of interest was contemplated under the regular rules of such allowance.<sup>2</sup> But if the contract contemplated payment of less than the statute rate, that contract, so long as culpable delay cannot be alleged against the debtor, should be respected.<sup>3</sup> And wherever a higher rate of interest is expressly reserved to be paid after maturity, such interest is recoverable unless the statute prohibits.<sup>4</sup>

§ 256. *Interest on Negotiable Instruments, etc.* — The computation of interest on bills and notes is frequently a matter of judicial cognizance; and the principles already noticed here apply with some variations. It is usual in a bill or note

<sup>1</sup> See the learned and exhaustive opinion of Gray, C. J., in *Union Institution v. Boston*, 129 Mass. 82, where (in a case relative to mortgage interest) the authorities on each side are fully stated. The English case of *Cook v. Fowler*, *supra*, is here criticised. But the Supreme Court of the United States supports a similar view. *Brewster v. Wakefield*, *supra*. That rule has been adopted as general in Kansas, Minnesota, South Carolina, Rhode Island, Kentucky, Arkansas, and Maine, and in Pennsylvania it long ago prevailed. In New York the question appears to be open. In Indiana, California, Texas, New Jersey, Illinois, Wisconsin, Iowa, Nevada, Tennessee, Ohio, Michigan, and Virginia, the doctrine upheld in *Massa-*

*chusetts* is favored; though in some of these instances because of statute. See also *Wadesboro Cotton Mills v. Burns*, N. C. (1894).

It is generally admitted that at all events the intent of the parties, if expressed with sufficient clearness, will control the question. 129 Mass. 95.

<sup>2</sup> See *Burns v. Anderson*, 68 Ind. 202.

<sup>3</sup> *Pierce v. Savings Bank*, 129 Mass. 425.

As to the constitutionality of certain American acts relating to interest rates, see *Hubbard v. Callahan*, 42 Conn. 524; *Winchester v. Building Association*, 12 Bush, 110.

<sup>4</sup> *Sheldon v. Pruessner*, 52 Kan. 579.

to express the maker's intention of paying (whether on demand or at a time certain) "with interest," — these words signifying an intent to pay the legal or statute rate of interest ; or if the statute gives parties the option of fixing higher rates by contract, the expression is with interest at such other rate as they may have plainly agreed upon. Here the rate is inferable from the contract ; and the contract may of course be to pay interest from date, though the note be payable at a later day. But on a time note, where interest is not expressed, interest runs only from its maturity.<sup>1</sup> A note payable on demand draws no interest until a demand or the institution of a suit, unless the parties have otherwise expressed their intention. But a note payable "with interest" whether on demand or on time would bear interest from its date.<sup>2</sup> Where a note is made payable at a day certain with less interest than the lawful rate, or without interest, and if not then paid "with lawful interest until paid," or similar expressions, lawful interest is to be computed from the date of the note, if it be not paid at maturity.<sup>3</sup> And so, too, the interest on a note for a particular sum, payable with interest on the happening of a certain event, should be computed from the date of the note.<sup>4</sup> Where a note bears interest from maturity, the interest begins to run from the day of payment specified, without allowing, as it appears, for days of grace.<sup>5</sup> It might be fair to suppose that the rate specified in a note continues after its maturity, rather than the lesser or "legal rate," if it remains unpaid ; but this, we have seen, is by no means certain.<sup>6</sup> Sometimes notes are made payable

<sup>1</sup> See 2 Pars. Bills and Notes, 392, 393.

<sup>2</sup> *Ib.* And see *Gardner v. Barnett*, 36 Ark. 476.

<sup>3</sup> *Daggett v. Pratt*, 15 Mass. 177 ; *Hackenberry v. Shaw*, 11 Ind. 392 ; *Pitman v. Barret*, 35 Mo. 84.

<sup>4</sup> *Washband v. Washband*, 24 Conn. 500.

<sup>5</sup> See *Ogden v. Saunders*, 12 Wheat. 213 ; *Sparhawk v. Wills*, 6 Gray, 164.

That action may be maintained for

the interest provided by the terms of a note after the principal has been paid, see 32 Ind. 348.

<sup>6</sup> See preceding section. And see *Ramsdell v. Hulett*, 50 Kan. 440 ; *Nye v. King*, 94 Mich. 411. Interest accepted in advance on a demand loan is *prima facie* evidence of an agreement to forbear collection, but not that the unearned interest shall be refunded if the maker pays off sooner. *Skelly v. Bristol Bank*, 63 Conn. 83.



at some future period with interest annually or semi-annually, or with the principal payable by instalments; and then complicated questions arise as to compounding interest, in case of the maker's default, or concerning a computation with allowance of the partial payments he has made; and of these matters we shall speak presently. Sometimes, again, they are made payable at a future day, and instead of bearing interest are sold at a discount to banks or individuals. This last is manifestly an indirect method of obtaining interest; and we presume that a time-note thus discounted would bear only legal interest from the date when it fell due, whatever the rate of discount might have been.<sup>1</sup> The main inquiry is as to what the parties in the particular contract intended expressly or with reference to custom in such cases.

Where an instrument is sued upon which on its face amounts simply to a mere acknowledgment of debt and not a promissory note, and which imports nothing as to the payment of interest, it is held that interest is computable, in the absence of contract, usage, or fraud, only from the date of the writ where no earlier demand of payment was made.<sup>2</sup> But as illustration of what a mutual intent outside the instrument or mere usage might accomplish, we should observe that various cases insist that a promissory note or any other instrument promising specifically to pay money, without any fixed time stated, nor words requiring a demand, is payable in law immediately, so that interest should run from its date.<sup>3</sup>

On bank-notes, though redeemable on presentation, interest does not accrue before a demand and refusal to pay, except, perhaps, in case of a notorious suspension of payment, where the demand would be a useless formality.<sup>4</sup> Nor does

<sup>1</sup> See *United States Bank v. Chapin*, 9 Wend. 471; *Chambliss v. Robertson*, 23 Miss. 302.

<sup>2</sup> *Gay v. Rooke*, 151 Mass. 115.

<sup>3</sup> *Horn v. Hansen*, 58 Minn. 43 (the case of a "wheat ticket"), and authorities cited; *Selleck v. French*, 1 Am. Lead Cas. (4th ed.) 507. Any promissory note is a valid unilateral

writing, supported by consideration, and not within the Statute of Frauds. Hence the transaction may be proved by the writing and by parol together.

<sup>4</sup> *Crawford v. Bank of Wilmington*, Phill. (N. C.) 136; *In re Herefordshire, &c., Co.* L. R. 4 Eq. 250. But see 2 Pars. Bills and Notes, 88.

a special deposit of funds for mere safe-keeping properly draw interest.<sup>1</sup> The coupons attached to railroad and other bonds draw interest after the payment of them has been unjustly neglected or refused.<sup>2</sup> So, as to dividends declared on stock, interest is not usually chargeable until demand and a corresponding default of payment.<sup>3</sup> If there are no funds at the place where coupons are to be presented for payment, a demand does not appear to be necessary in order to make them draw interest.<sup>4</sup> But, on the other hand, it is held that where the interest-bearing loans of a corporation are made payable at a fixed place and time, and the corporation is prepared to pay accordingly, the interest thereon ceases at that time, whether the bond or evidence of indebtedness be presented or not.<sup>5</sup>

The disposition of our latest cases is to regard interest coupons which are expressed in form like individual promissory notes, as bearing interest each from maturity for simple default if duly presented and dishonored;<sup>6</sup> and a similar rule is applied to instalments of interest on a note with semi-annual or other periodical rests.<sup>7</sup>

<sup>1</sup> *Duncan v. Magette*, 25 Tex. 245. But as to damages by way of punishment for a default in surrendering, see § 257, *post*.

<sup>2</sup> *Beaver v. Armstrong*, 44 Penn. St. 63; *Mills v. Jefferson*, 20 Wis. 50; *Aurora City v. West*, 7 Wall. 82; *Whitaker v. Hartford R.*, 8 R. I. 47; *Humphreys v. Morton*, 100 Ill. 592.

<sup>3</sup> *State v. Baltimore & Ohio R. R. Co.*, 6 Gill, 363.

But as to the warrants and obligations of a State or municipal corporation, a different rule (as, *e.g.*, that of statute authority) may apply, so as to prevent the recovery of interest altogether. See *Allison v. Juniata County*, 50 Penn. St. 351; *Pekin v. Reynolds*, 31 Ill. 529; *Ashe v. Harris County*, 55 Tex. 49; *Gray v. State*, 72 Ind. 567; § 262, *post*.

<sup>4</sup> *North Penn. R. R. Co. v. Adams*, 54 Penn. St. 94.

<sup>5</sup> *Emlen v. Lehigh Coal Co.*, 47 Penn. St. 76.

<sup>6</sup> See 19 N. Y. S. 37; 114 N. Y. 122; *Hall v. Scott*, 90 Ky. 340. Supposing such interest, together with interest on the principal sum, not to exceed the maximum legal rate of interest on the principal. *Murtagh v. Thompson*, 28 Neb. 358. But such interest coupons ought to have been duly presented for payment. 115 N. Y. 297. And some cases disincline to applying the rule of interest coupons to a note with periodical rests. *Bowman v. Neely*, 151 Ill. 37.

<sup>7</sup> In *Hall v. Scott*, 90 Ky. 340, *Bennett, J.*, lays down the rule, that where a promissory note provides that it shall bear interest "payable semi-annually," each semi-annual instalment of interest bears interest from its own maturity until paid, as any other interest-bearing debt; but

§ 257. **Interest imposed by Way of Punishment.** — A debtor who is in default for not paying money in pursuance of his contract is often considered liable for interest by way of indemnity, or as a punishment for wrongfully detaining what he owed. And we find interest allowed in the nature of damages for breach of contract, for unreasonable and vexatious delay in payment of debts, and in certain wrongful acts of a similar character; and local statutes, too, are frequently explicit in this respect.<sup>1</sup> But to make what the law deems an unreasonable and vexatious delay, and generally to justify the allowance of interest in the nature of damages, it is not enough that something was due over which there had been an honest controversy; nor that, by some mutual mistake of the parties, the whole sum due had not been paid, or too much had been received; but there should appear to have been a want of good faith and fair dealing on the part of the one from whom interest is claimed on any such ground.<sup>2</sup> A holder of collateral securities who appropriates the fund to his own use is liable for interest.<sup>3</sup> And for the wrongful detention of money due for goods sold and delivered, — the time of payment having been previously agreed upon, — interest may be claimed by way of damage, if not by virtue of the contract itself.<sup>4</sup> But whether, for a mere non-delivery of goods by a common carrier or other person, there being no delinquency, fraud, or injustice on his

the interest should be computed semi-annually only until the maturity of the note, after which interest on the whole note should be presumably computed in the ordinary way; though interest on each preceding instalment then unpaid should run until paid. Why this same rule should not be applied to interest instalments falling due after the note matures, appears founded on the presumption that no such undertaking existed; for the agreement to pay interest by instalments before maturity of the debt itself is a special contract by which the creditor receives more benefit than by taking principal

with interest at maturity; such a contract beyond maturity must therefore specially appear. See § 263.

<sup>1</sup> *Jones v. Mallory*, 22 Conn. 386; *Sammis v. Clark*, 13 Ill. 544; *Leake, &c. Orphan House v. Lawrence*, 11 Paige, 80; *Drury v. Cross*, 7 Wall. 299; *Rogers v. West*, 9 Ind. 400; *Devine v. Edwards*, 101 Ill. 138.

<sup>2</sup> *Hubbard v. Charlestown Branch R. R. Co.*, 11 Met. 124; *Passenger Railway Co. v. Philadelphia*, 51 Penn. St. 465.

<sup>3</sup> *Tarpley v. Wilson*, 33 Miss. 467.

<sup>4</sup> *National Lancers v. Lovering*, 10 Fost. 511.

part, interest is always allowable as a matter of law, is in dispute and may well be doubted.<sup>1</sup> Where an excessive amount is demanded, and the debtor offers to pay all that is due, the creditor cannot claim interest on the proper balance from the time of the demand; for the delay is through his own fault.<sup>2</sup>

Independently of this consideration of unreasonable and vexatious delay and wrongful conduct, interest cannot be allowed upon unliquidated damages for the non-performance of a contract; and this principle is of general application.<sup>3</sup> And where the condition of a penal bond is the performance of some collateral act, interest upon the assessed damages does not necessarily accrue.<sup>4</sup> In an action for the breach of a contract by whose terms damages for the breach are liquidated, interest is properly chargeable upon the amount fixed as with reference to the date when default occurred in paying such damages.<sup>5</sup>

§ 258. **Interest where Suit is brought.**—The principles already discussed apply to suits, whether at law or in equity or admiralty; while at the same time matters of practice must depend largely upon local usage and the local statutes. In general, upon unliquidated and practically unascertained demands, interest can be recovered only from the commencement of the suit, and not from a previous demand, unless

<sup>1</sup> See *Chicago, &c. R. R. Co. v. Ames*, 40 Ill. 249; *Kyle v. Laurens R. R. Co.*, 10 Rich. 382; *Fowler v. Davenport*, 21 Tex. 626; *Dana v. Fieldler*, 12 N. Y. 40; *Richmond v. Bronson*, 5 Denio, 55. In case of a loss for which a carrier is found liable, interest is recoverable upon the value of the property from the date of loss. *Mote v. Chicago R.*, 27 Iowa, 22.

<sup>2</sup> *Lusk v. Smith*, 21 Wis. 27. For the application of the rule of recovering interest by way of damages to debts maturing under a special contract, which provides for other than the usual or legal rate, see *Gray, C. J.*, in *Union Institution v. Boston*,

129 Mass. 82, commenting upon the various discordant authorities. Large rates stated in case the note is not paid at maturity are penal in their nature and not to be favored in a simple default. 34 Neb. 181.

<sup>3</sup> *Buckmaster v. Grundy*, 3 Gilm. 626.

<sup>4</sup> *Trice v. Turrentine*, 13 Ired. 212. See *Ward v. Smith*, 7 Wall. 447.

<sup>5</sup> *Winch v. Mutual Benefit Ice Co.*, 86 N. Y. 618. But a bond for the payment of a fixed sum is presumed to bear interest from its date, though no time of payment is mentioned and nothing is said therein expressly of demand or interest. 7 T. R. 120; *Purdy v. Phillips*, 11 N. Y. 406.

fraud, bad faith, or vexatious delay is imputable against the defendant; and where the debt ordinarily bears no interest before demand and default of payment, a demand must be proved, or else a like rule will be applied in the computation of interest.<sup>1</sup> But the commencement of a suit is a sort of judicial demand; and even an award will carry interest from the date of its entry and not from that of judgment upon it.<sup>2</sup> The allowance of interest in suits by way of damages is, after all, hardly a matter of strict law, and may be said to rest mainly in the discretion of a jury.<sup>3</sup> And while judgments do not at the common law bear interest, it is now the practice in most parts of this country to allow a judgment or decree to carry interest until paid, if there be no special reason for its disallowance.<sup>4</sup> One who is enjoined against paying over money may protect himself by paying the money into court; and as to a garnishee or trustee, unless he uses or makes profit upon the money for which he is liable, or has been bound by express or implied contract to pay interest upon it independently of the suit, he is not chargeable with interest, the presumption being that he keeps the fund intact to answer the judgment of the court.<sup>5</sup>

§ 259. *Interest in Transactions relating to Real Estate; on Rents, Mortgage Debts, etc.* — Interest is frequently charge-

<sup>1</sup> *Palmer v. Stockwell*, 9 Gray, 287; *Ordway v. Colcord*, 14 Allen, 59; *Hunt v. Smith*, 3 Rich. Eq. 465; *Stimpson v. Green*, 13 Allen, 326; *Lyon v. Byington*, 10 Iowa, 124; 55 Iowa, 612; *Umbria, The*, 11 U. S. App. 691. Where, after a public officer's death, his bond was sued without previous demand on his representatives or notice to the sureties, it was held that interest could only be recovered from the date of service of the writ. *United States v. Curtis*, 100 U. S. 119. As to interest after demand, see § 253.

<sup>2</sup> *Buckman v. Davis*, 28 Penn. St. 211; 85 N. C. 441. Unless a claim be such that interest can be set running by a demand, interest cannot be allowed from the time of commence-

ing the action. *White v. Miller*, 78 N. Y. 393; *Hall v. Farmers' Bank*, 55 Iowa, 612.

<sup>3</sup> *Lincoln v. Claffin*, 7 Wall. 132.

<sup>4</sup> See *Hemmenway v. Fisher*, 20 How. 255.

<sup>5</sup> *Irwin v. Pittsburgh, &c. R. R. Co.*, 43 Penn. St. 488; *Rennell v. Kimball*, 5 Allen, 356; *Moore v. Lowrey*, 25 Iowa, 336; *Blodgett v. Gardiner*, 45 Me. 542; *Candee v. Webster*, 9 Ohio St. 452; *Lilley v. Life Ins. Co.*, 92 Mich. 153; 141 U. S. 40.

General works on Damages, Practice, &c., may well be consulted, as to the judicial allowance of interest in suits. Fluctuations of the statute as to allowance of interest, considered, in decreeing interest on a long

able in transactions relating to real as well as personal property. Thus interest is frequently allowed upon rent from the time it becomes due ; though the right to claim it independently of some demand and default under a lease might be affected by the usual course of dealing between landlord and tenant or their mutual agreement.<sup>1</sup> And the judgment in a foreclosure suit brought to enforce the payment of a real-estate mortgage note may be permitted to include interest for the whole period claimed, though a suit upon the note were barred by the Statute of Limitations ; the covenants of the mortgage bearing up the whole transaction.<sup>2</sup> But where a tender of the debt has been made by the mortgagor pursuant to law, and there is delay, through fault of the mortgagee, in discharging the mortgage and restoring the premises, interest should not be allowed on the debt subsequently to the tender.<sup>3</sup> Of course, if the party having the right to redeem tenders the mortgage-money on a condition which he had no right to make, he cannot after a refusal insist on an abatement of the interest.<sup>4</sup> The question still recurs constantly, which party was at fault? As to interest in general on a real-estate mortgage, the terms of the bond or note for which the mortgage is security should, in connection with our present discussion, determine its amount.<sup>5</sup>

§ 260. *Interest as to those holding Trust Funds, etc.* — But interest is not only in practice allowed on the ground of an express or implied contract, or by way of essential damage for some misconduct. In the case of guardians, trustees, factors, and others entrusted with the management of funds which do not belong to them, a fair element of consideration is

account. 31 N. J. Eq. 91; Taylor v. Wing, 84 N. Y. 471.

<sup>1</sup> Stockton v. Guthrie, 5 Harring. 204; White v. Walker, 31 Ill. 422; McQuesney v. Heister, 33 Penn. St. 435; Burnham v. Best, 10 B. Monr. 227; Van Rensselaer v. Jewett, 2 Comst. 135; Wagstaff v. Smith, 4 Ired. Eq. 1; 8 Ill. App. 367.

<sup>2</sup> Wiswell v. Baxter, 20 Wis. 680.

<sup>3</sup> Brown v. Simons, 45 N. H. 211.

<sup>4</sup> Rives v. Dudley, 3 Jones Eq. 126.

<sup>5</sup> Union Institution v. Boston, 129 Mass. 82, and cases cited. A mortgagee's verbal promise to reduce the rate of interest specified in the mortgage is not binding if without consideration. 80 Mich. 249.

that property ordinarily earns a regular percentage of profit, which percentage belongs no less to the true owner on a just reckoning than the original capital; and this is a good reason why such persons, so far as their connection with funds is for management, and not a temporary custody and control, should be charged with interest on the property where the opportunity to invest has been neglected, without some good excuse; though it may be well enough said that the interest allowed in such case is because of one's default or misconduct.<sup>1</sup> Agents, factors, and attorneys are chargeable with interest on the moneys unreasonably detained which they have been instructed to remit, though not ordinarily for moneys collected and held subject to the owner's order; executors and administrators, on account of the temporary nature of their trust, are shown much greater indulgence than guardians and trustees in this matter of liability for interest, and generally need not account for interest at all; and all parties holding property in trust will be allowed a reasonable time to invest. Of course, no one is allowed to appropriate the profits made by the use of funds committed to his keeping, but the gain accrues to principal, client, or *cestui que trust*, as the case may be.<sup>2</sup> Yet one who is a mere stakeholder, and liable at the same time to answer to one or another party, is held not liable for interest upon money in his hands, though he makes a profit by its use;<sup>3</sup> an exception which cannot be safely extended far.<sup>4</sup>

On the other hand, there are circumstances under which

<sup>1</sup> See *Perry Trusts*, § 471; *Schoul. Dom. Rel.* § 354; *Clemens v. Caldwell*, 7 B. Monr. 171; *Bryant v. Craig*, 12 Ala. 354; *Schoul. Ex'rs*, § 538; *Johnson v. Hedrick*, 33 Ind. 129.

<sup>2</sup> *Ib.* And see *Hauxhurst v. Hovey*, 26 Vt. 544; *Barney v. Saunders*, 16 How. 535; *Hill v. Hunt*, 9 Gray, 66.

<sup>3</sup> *Jones v. Mallory*, 22 Conn. 386.

<sup>4</sup> See *Moors v. Washburn*, 159 Mass. 172.

When a loan is negotiated, the

retention of part of the fund for an unreasonable time entitles the borrower to a rebate of interest. *Dodge v. Tulleys*, 144 U. S. 451. And wherever the lender, on security or otherwise, refuses to receive his money on reasonable tender, he loses the right to further interest. *Loomis v. Knox*, 60 Conn. 343. Where money is paid into the bank at which the note was payable, no interest is payable after the maturity of the note. *Cheney v. Libby*, 134 U. S. 68.

one holding a place of trust may claim the allowance of interest for advances made out of his private funds for the benefit of the trust.<sup>1</sup>

§ 261. **Interest upon Legacies or Annuities.** — Interest is frequently payable upon legacies and annuities; but, where no time is fixed by the testator's will, the general practice is not to allow interest until the expiration of one year from the death of the testator, at which time a legacy is properly demandable; exception being made in favor of a child who is left without other provisions for maintenance in the mean time, and who should be paid sooner.<sup>2</sup>

§ 262. **Immunity and Privilege of Government as to Interest.** — From a liability for interest, the State usually claims exemption, save so far as concerns loans made on its express contract and with legislative authority. The usage of government is not the usage of individuals; and constitutional limitations of authority are imposed upon the State and even upon municipal corporations, which are of no application elsewhere.<sup>3</sup>

§ 263. **Compound Interest.** — Compound interest, or interest upon both principal and interest, may be demanded in certain cases; and the right to it sometimes arises in the case of a note with interest payable annually or at other designated periods, where the debtor runs into arrears on the payment of the instalments as well as of the principal. Ordinarily, simple interest, or interest by computation upon the principal sum for the entire period of default, can alone be allowed upon a debt; and it is thought hard and iniquitous for one to exact compound interest, even where he can legally claim it, unless the debtor was guilty of some gross and intentional

<sup>1</sup> Schoul. Ex'rs, §§ 541, 542.

<sup>2</sup> 2 Redf. Wills, 572, and cases cited; Allen v. Crosland, 2 Rich. Eq. 68; Gill's Appeal, 2 Penn. St. 221; Roberts v. Malin, 5 Ind. 18; Burtis v. Dodge, 1 Barb. Ch. 77; Schoul. Ex'rs, §§ 480-482.

<sup>3</sup> Gordon v. United States, 7 Wall. 188; Pekin v. Reynolds, 31 Ill. 529; State v. Mayes, 28 Miss. 706; Tillson

v. United States, 100 U. S. 43. So as to refunding duties. 62 Fed. 153. See § 256. The State does not relax the right to claim interest from those with whom it has business relations. See 54 Tex. 313. But interest is not allowable on taxes unless the statute gives it. Western Union Tel. Co. v. State, 55 Tex. 314.



misbehavior.<sup>1</sup> Where there is no special agreement incorporated into the contract or established between the parties, interest on interest certainly cannot be allowed.<sup>2</sup> And if interest is due upon a mortgage note with annual or semi-annual instalments, some special agreement is required in many States, after the interest becomes due, to change that interest into principal and make it bear interest *in futuro*.<sup>3</sup> Nor, according to some decisions, should the usage among merchants to strike annual balances be regarded as justifying of itself the annual compounding of interest.<sup>4</sup>

For gross negligence or intentional misconduct, as in the case of trustees who speculate and waste trust funds committed to their keeping, the courts sometimes make annual rests and charge the delinquent parties with compound interest by way of penalty.<sup>5</sup> And upon coupon obligations in these days, which amount to promissory notes, a practical

<sup>1</sup> See Blyd. Usury, 68, 69, and cases cited; Rayner v. Bryson, 29 Md. 473.

<sup>2</sup> See Toll v. Hiller, 11 Paige, 228; Rose v. City of Bridgeport, 17 Conn. 243.

<sup>3</sup> *Ib.*; Banks v. McClellan, 24 Md. 62; Van Huson v. Kanouse, 13 Mich. 303; Gunn v. Head, 21 Mo. 432; Stone v. Locke, 46 Me. 445; Ferry v. Ferry, 2 Cush. 92; Dyar v. Slingerland, 24 Minn. 267. Where a promissory note is given with a stipulation that interest is to be paid semi-annually (or annually, &c.), the maker is chargeable with interest at the like rate upon each deferred payment of interest as if he had given a promissory note for the amount of such interest. Bledsoe v. Nixon, 69 N. C. 89. But the English chancery rule is that, in the absence of a special agreement, simple interest alone can be charged in a mortgage account. Daniell v. Sinclair, 6 App. Cas. 181. Interest may be computed on overdue and unpaid express instalments; but no instalments of semi-annual inter-

est will be considered as due after the maturity of the note; because after that, both the accruing interest and principal are due, not on any particular day, but every day until paid. Wheaton v. Pike, 9 R. I. 132. And see Cramer v. Lepper, 26 Ohio St. 59; § 256 *supra*. An agreement to pay interest upon interest must, in order to be valid, be made after the interest which is to bear interest has become due, and it must be supported by sufficient consideration; *e.g.* a forbearance to sue. Young v. Hill, 67 N. Y. 162. As to a peculiar provision in a promissory note, see 24 Minn. 43; 54 Cal. 562.

<sup>4</sup> Von Hemert v. Porter, 11 Met. 210. See Wright v. Eaves, 10 Rich. Eq. 582; Carpenter v. Welch, 40 Vt. 251; Preston v. Walker, 26 Iowa, 205.

<sup>5</sup> Ford v. Vandyke, 11 Ired. 227; Attorney-General v. Alford, 4 De G. M. & G. 851; Perry Trusts, § 471; Johnson v. Hedrick, 33 Ind. 129.

compounding of interest on the principal obligation is judicially sanctioned.<sup>1</sup>

§ 264. **Rule of Interest in Partial Payments.** — Since partial payments, however, are frequently made on an interest-bearing debt, it becomes important to apply the well-known rule of Chancellor Kent, which the courts of this country have commonly recognized: namely, to apply the payment in the first place to the discharge of the interest then due; if the payment exceeds the interest, to carry the surplus towards discharging the principal, and compute the subsequent interest on the balance of the principal remaining; but if any payment be less than the interest due, not to take the surplus of interest to augment the principal, but cast the interest on the former principal until the period when the payments taken together exceed the interest due.<sup>2</sup> This rule is fairer to the lender than the rule of compound interest, and is preferred both in the courts and among business men.

§ 265. **As to Usury; Characteristics of Usury Laws.** — II. And now to pass from interest to usury. If proof were needed of the practical difficulties which block the enforcement of usury laws, it might readily be found by examining the current decisions of our State courts. The later American reports are full of distinctions in usurious contracts, which, though true in the main to certain leading principles, vary widely in their application with the intrinsic merits of each case, the consequences of illegality, and local public sentiment, whether for or against restraints of this nature upon mercantile traffic. In the matter of contrivances for evading the legal penalties against usury, human ingenuity exhausts itself; and many are the cunning expedients, not

<sup>1</sup> *Supra*, § 256. On the principle of a demand for payment of a debt which was actually due at a certain time, and the debtor's default, why should not the payee have a right to demand and exact interest for one's unreasonable delay in paying a periodical interest instalment? See §§ 253, 254.

<sup>2</sup> *Connecticut v. Johnson*, 1 Johns. Ch. 13. See *Anketel v. Converse*, 17 Ohio St. 11; *Townsend v. Riley*, 46 N. H. 300; *Dean v. Williams*, 17 Mass. 417; *Leonard v. Wildes*, 36 Me. 265; *Baker v. Baker*, 4 Dutch. 13; *Smith v. Coopers*, 9 Iowa, 376; *Riney v. Hill*, 14 Mo. 500.

merely of felons and social reprobates, but of bankers and business men of high standing, which are found to fail when submitted to the test of litigation; while it can hardly be doubted that, in every State where a rigid policy prevails, mercantile transactions in violation of the usury laws are constantly carried on between parties who take all legal risks and know their mutual interests too well to call upon the courts for direction.<sup>1</sup>

§ 266. **What Contracts are Usurious; Questions of Intent.**—

But, upon the whole, what contracts may and what may not be pronounced usurious? And where is the line to be drawn between them? It is a well-settled principle, to begin with, that the essence and not the form of a contract will determine whether or not the contract is usurious; and no matter what the ostensible purposes of a transaction may have been, or the language employed, the courts will explore the truth; and if they find that the object was a loan of money at more than the legal rate of interest, they will pronounce it usurious. Usury is mainly and fundamentally a question of intent; and, to constitute a usurious contract as usually found, there should be first a loan, and next an agreement to pay more than legal interest upon it. No sham, no device, no trick of the parties to the contract, can be set up to defeat the operation of the usury laws, where these two elements concur; it being also understood that the money borrowed is to be repaid in any event.<sup>2</sup>

And yet where the thing or amount borrowed is not necessarily to be returned, but the principal is *bonâ fide* put at hazard, it is frequently held that more than the legal interest can be taken.<sup>3</sup> And if a payment be conditional, and that

<sup>1</sup> The repeal of the English usury laws (*supra*, § 251) does not deprive equity of its jurisdiction as to relieving expectant heirs, &c., against unconscionable bargains. L. R. 8 Ch. 484; *Nevill v. Snelling*, 15 Ch. D. 679.

<sup>2</sup> See *Blyd. Usury*, 33; *Cowp.* 114; *Wetter v. Hardesty*, 16 Md. 11; *Jarvis' Appeal*, 27 Conn. 432; *Scott v. Lloyd*, 9 Pet. 418; *Fitz-*

*simons v. Baum*, 44 Penn. St. 32. A mere renewal does not purge of usury. *Eslava v. Crampton*, 61 Ala. 507; *National Bank v. Lewis*, 75 N. Y. 516. But under some statutes usury may exist without a loan of money. See *Crawford v. Johnson*, 11 Ind. 258.

<sup>3</sup> See *Pomeroy v. Ainsworth*, 22 Barb. 118; *Blyd. Usury*, 33-37.

condition is in the power of the debtor to perform, so that the creditor may by the debtor's act be deprived of any extra payment, it follows that the transaction is not usurious.<sup>1</sup> But the rule of hazard or contingency is to be applied with caution; for a loan upon a merely colorable or very slight contingency contrived so as to avoid the statutes against usury might not stand. The principal being placed in jeopardy, however, in case of a life annuity, the annual payments thereon are not usurious.<sup>2</sup> Nor can usury ordinarily result from the act and intention of one of the parties to the contract alone; for both must have been cognizant of the facts which constitute the usury.<sup>3</sup> Again, an error in calculation, an accidental omission of credit, or a transfer by mistake of an item from one account to another, will not alone make a security usurious;<sup>4</sup> but the mistake should be rectified rather. But if a contract be clearly usurious, and more than legal interest be intentionally taken, whether the party knows that the transaction is within the usury laws or not, the legal consequences must follow; the transaction speaks for itself.<sup>5</sup> Once more, the question of usury refers to the time of the transaction; and the use which the borrower makes afterwards of the money cannot change the result and is not a proper subject of inquiry.<sup>6</sup> And of course, where there is no usurious agreement, the question whether there was an usurious intent is immaterial.<sup>7</sup>

The situation of the parties to the usurious transaction, and the character of the transaction, may sometimes affect the action of the court in such matters; as, for instance,

<sup>1</sup> *Sumner v. People*, 29 N. Y. 223; *Blyd. Usury*, 32; *Busby v. 337*; *Lawrence v. Cowles*, 13 Ill. 577; *Finn*, 1 Ohio St. 409; *Marsh v. Martindale*, 3 B. & P. 150.

<sup>2</sup> *Howkins v. Bennet*, 7 C. B. x. s. 507. See *Spain v. Hamilton*, 1 Wall. 604; *Waite v. Mining Co.*, 37 Vt. 608. <sup>3</sup> *Cro. Jac.* 507; *Bank of Salina v. Alvord*, 31 N. Y. 573; *Thompson v. Nesbit*, 2 Rich. 73. And see *Craig v. Pleiss*, 26 Penn. St. 271.

<sup>4</sup> *Hayward v. Le Baron*, 4 Fla. 404; *Aldrich v. Reynolds*, 1 Barb. Ch. 43. See *Simpson v. Fullenwider*, 12 Ired. 334. <sup>5</sup> *Bondurant v. Commercial Bank*, 8 S. & M. 533; *Brown v. Nevitt*, 27 Miss. 801.

<sup>6</sup> *Marvine v. Hymers*, 12 N. Y. 223; *Smith v. Paton*, 31 N. Y. 66.

where they do not deal on equal terms, where the lender gets some undue advantage over the borrower, or uses fraud or force; for unconscionable bargains should not be sustained, though all usury laws were abolished.<sup>1</sup>

§ 267. **Change or Renewal of Usurious Contract.**—If a contract be usurious in its inception, no renewal of it or change in the form can alter its original character. Thus, where a bond is given upon a usurious agreement, which is afterwards destroyed and another bond given upon the same terms, the substitution of the one for the other cannot avail the parties to the usury; because, as the second bond was given in consideration of the first which was invalid, it must follow that the second is invalid also.<sup>2</sup> And the substitution of a new security for the same usurious debt renders the new security invalid, as was the original.<sup>3</sup>

But parties may determine to free themselves from the vice of usury and start anew; and where they destroy the usurious security and make a settlement of the transaction, and substitute new securities in good faith for an actual loan, and then have no further intent of evading the usury laws, the new contract and new securities will stand. And although the new principal be for the same sum as the old, and though usurious interest were taken upon the loan as it formerly existed, which has not been refunded, the new transaction is not thereby vitiated.<sup>4</sup> It has been said that the substance of the older decisions amounts to this: that inasmuch as an actual agreement between borrower and lender on the one part to pay, and on the other to receive, more than the legal rate of interest, is necessary to constitute usury; so, an actual agreement between the same

<sup>1</sup> See *Miller v. Cook*, L. R. 10 Eq. 641; *Cowp.* 116; 15 Ch. D. 679.

<sup>2</sup> *Blyd. Usury*, 91; *Stanley v. Westrop*, 16 Tex. 200; *Pearson v. Bailey*, 23 Ala. 537; *Tuthill v. Davis*, 20 Johns. 285; *Nelson v. Hurford*, 11 Neb. 465.

<sup>3</sup> *Ib.*; *Campbell v. McHarg*, 9 Iowa, 354; *Jackson v. Packard*, 6

*Wend.* 415; *Wales v. Webb*, 5 Conn. 154; *Cross v. Mann*, 53 Vt. 501; 61 Ala. 507; 75 N. Y. 516.

<sup>4</sup> *Hoyt v. Bridgewater, & Co.*, 2 Halst. Ch. 253; *Smith v. Stoddard*, 10 Mich. 148; *De Wolf v. Johnson*, 10 Wheat. 367. And see *Blyd. 91 et seq.*, and cases cited; *Hammond v. Hopping*, 13 *Wend.* 505.

parties or their legal representatives to cleanse the transaction is also necessary to render valid any subsequent promise for the payment of the original principal.<sup>1</sup> But, according to the later American cases, it would appear that the rule has relaxed further, and that an actual agreement need not now be shown, if the circumstances sufficiently imply a mutual intent of the parties to get rid of the usury on a renewal or substitution of securities, or otherwise, which intent has been carried out by their own acts.<sup>2</sup> The great difficulty lies, however, in distinguishing between a *bond fide* substitution of new securities for old, with a new promise, and the mere carrying along, extending, or renewing an old usurious loan with a mere pretence of substituting new securities. When parties have come to a genuine settlement after actually paying and taking usury, and then made new securities which include the actual loan and no more, the new contract is not to be regarded as usurious. But if they keep the original usurious transaction with its security outstanding, or if they make a new security which embraces a claim for unpaid usurious interest, or if they substitute securities without the intervention of some new and distinct and proper consideration, it can hardly be doubted that the whole transaction, including the securities, will be treated as infected with the original usury.<sup>3</sup>

<sup>1</sup> See Blyd. Usury, 96.

<sup>2</sup> A usurious contract may be purged of usury by refunding the usurious payments already made, and thereafter drawing the legal rate of interest. *Phillips v. Building Association*, 53 Iowa, 719. Something depends, perhaps, upon the statute consequences of usury; whether in making the contract "void," or otherwise. See § 283, *post*. And cf. *Marks v. McGehee*, 35 Ark. 217.

<sup>3</sup> See *Hazard v. Smith*, 21 Vt. 128; *Smith v. Stoddard*, 10 Mich. 148; *Miller v. Hull*, 4 Denio, 104. As to the taking of several notes at a bank at usurious rates, and paying the full balance by a new note, see *Ticonic*

*Bank v. Johnson*, 31 Me. 414. And see *Coulter v. Robertson*, 14 S. & M. 18; *Turneys v. Hunt*, 8 B. Monr. 401; *Hightower v. Beall*, 66 Ga. 102; *Hoopes v. Ferguson*, 57 Iowa, 39. The payment of usurious interest for a period already elapsed on a note or other money obligation, is a good consideration for an agreement to extend the time of payment, notwithstanding the usurious interest might be recouped. *Lemmon v. Whitman*, 75 Ind. 318. Cf. 47 Iowa, 62. For a usurious transaction where interest was regularly paid on the note in advance, see *Sanner v. Smith*, 89 Ill. 123. To agree to pay more than legal interest for past forbearance.

§ 268. **Taking Usury where a Contract was not originally Usurious, etc.**—In order to defeat a contract on the ground of usury, it must have been usurious in its inception, or when originally made; and if the contract was not usurious then, it will not become so through the receipt of usurious interest upon it afterwards; though a statute penalty for taking usurious interest would appear to be incurred whenever one takes it.<sup>1</sup> And when the payee of a note which is good as it originated makes a special contract for a usurious rate afterwards to forbear enforcing payment, it is the special contract of forbearance which is usurious, while the original note remains untainted.<sup>2</sup> Where, however, money is loaned at the highest legal rate, any special contract to pay a sum additional in consideration of extension would be usurious.<sup>3</sup> A renewed note may thus be usurious when the original note was not.<sup>4</sup> These same principles apply to bonds and various other instruments.<sup>5</sup>

A transaction which is inseparable is liable to the penalties of the statute if tainted with usury; but where of separate and independent transactions one is usurious and not the other, the latter is free of the taint, even though contemporaneous and between the same parties.<sup>6</sup>

§ 269. **Compounding Interest, Discounting, Selling Notes, etc., not Usurious.**—A contract that interest falling due from

or in consideration of extending the time of payment, is usurious. But an agreement in advance to pay a sum of money by a day certain, and more than legal interest by way of penalty if the debt be not punctually paid, is held not usurious, if the parties had not intended at the time to evade the usury laws. See *Davis v. Rider*, 53 Ill. 416; *Wilson v. Dean*, 10 Iowa, 432; *Rogers v. Sample*, 33 Miss. 310; *Mitchell v. Doggett*, 1 Fla. 356; *Fisher v. Otis*, 3 Chand. (Wis.) 83. The rule appears to be otherwise in some States. See *Waller v. Long*, 6 Munf. 71. And simple interest paid for the forbearance of usury is, of course, no usury. *Briggs*

*v. Sholes*, 15 N. H. 52. And as to miscellaneous points, see *Fry v. Coleman*, 1 Grant Cas. 445; *Coon v. Swan*, 30 Vt. 6.

<sup>1</sup> Blyd. 97; *Busby v. Finn*, 1 Ohio St. 409; *Swartwout v. Payne*, 19 Johns. 294; *Drury v. Morse*, 3 Allen, 445; *Ware v. Thompson*, 2 Beasl. 66; *Godfrey v. Leigh*, 6 Ired. 390. See § 289.

<sup>2</sup> *Mallett v. Stone*, 17 Iowa, 64; *Cobb v. Morgan*, 83 N. C. 211.

<sup>3</sup> *Rosebrough v. Ansley*, 35 Ohio St. 107. <sup>4</sup> 42 Neb. 437.

<sup>5</sup> See *Ware v. Thompson*, 2 Beasl. 66; *Ballinger v. Edwards*, 4 Ired. Eq. 449.

<sup>6</sup> See 28 Ill. App. 305, where such

time to time shall be turned into principal and bear interest, if not paid when due, is not usurious ; for, as we have seen, compound interest may lawfully be taken, upon a delinquency, if the parties so choose.<sup>1</sup> And notwithstanding the rate of interest is fixed by law at so much per annum, a contract may lawfully be made for the payment of that rate before the principal comes due, in periods shorter than a year.<sup>2</sup> Furthermore, where one who is entitled to collect interest and principal at a certain date takes instead a new note for the total amount bearing legal interest, this is not a usurious transaction.<sup>3</sup> In short, compounding or anticipating interest is not usurious, even though public policy in the particular instance should disallow it.<sup>4</sup>

An advantage even superior to that of compounding interest is gained by the lender when a discount is allowed ; for here he secures interest in advance, by reserving it from the amount lent, and may, by investing the sum reserved, gain interest upon interest. Money is now frequently loaned in this way upon time notes ; and the practice is well established as legal, not only in bank loans, but in those of individual capitalists, so far as concerns discounts at a legal rate.<sup>5</sup> By an English statute of the reign of William IV., the business of discounting short notes was expressly excepted from the operation of the old usury laws ; and similar enactments may be found in parts of the United States.<sup>6</sup> The practice of discounting was first recognized as lawful on behalf of banks, and half a century ago our courts seem to have been disposed to confine its operation to bankers and those who

separate loans were protected by the same mortgage security.

<sup>1</sup> *Supra*, § 263 ; *Hale v. Hale*, 1 Cold. 233 ; *Brown v. Vandyke*, 4 Halst. Ch. 795 ; *Stewart v. Petree*, 55 N. H. 621 ; *Hawley v. Howell* (Iowa), 14 N. W. Rep. 199. But see 70 Ind. 373 ; 54 Vt. 573. The custom of stockbrokers to debit and credit interest monthly, computing interest on balances, is not necessarily usurious. *Hatch v. Douglas*, 48 Conn. 116.

<sup>2</sup> *Meyer v. Muscatine*, 1 Wall. 384. And see *Hoyt v. Bridgewater, &c. Co.*, 2 Halst. Ch. 253.

<sup>3</sup> *Holland v. Mosteller*, 6 Jones Law, 582.

<sup>4</sup> *Bowman v. Neely*, 151 Ill. 37.

<sup>5</sup> Blyd. 58, 59 ; *Parker v. Cousins*, 2 Gratt. 372 ; *Marvine v. Hymers*, 12 N. Y. 223 ; *Cowles v. McVickar*, 3 Wis. 725 ; 49 Ill. App. 564.

<sup>6</sup> Stat. 3 & 4 Will. IV. c. 98. See *Wms. Pers. Prop.* 5th Eng. ed. 89.



dealt in commercial paper by way of trade ; but the tendency of the day is towards a more liberal allowance of the practice, so long as the lender *bond fide* advances the whole principal, and deducts only legal rates of interest. Whether, on a discount of a bill or note, it is usurious to reckon the month at thirty days and the year at three hundred and sixty days and compute accordingly, seems in dispute ; but mercantile usage is probably in its favor.<sup>1</sup> But where, under the pretext of discounting a note, more than the legal rate is taken out by the lender, the transaction is usurious.<sup>2</sup> A court is not to be misled by appearances in such a case ; and whether maker, payee, indorser, indorsee, or any holder is concerned, he will be affected by participation in the usury. Nor does it matter in civil consequences, that the lender acted in good faith and without actual intention of evading the law which is violated.<sup>3</sup>

Yet when it comes to the sale of commercial paper for less than its face, and at a discount, new considerations are found to arise, which just at this time receive much attention in our courts ; and certainly the present tendency is towards sustaining the *bond fide* sale and purchase of negotiable securities for any rate of discount, through brokers or otherwise, and this although the practical effect might be to defeat the policy of the usury laws.<sup>4</sup> In this respect, as in others, the business community are apt to strain a doubtful point,

<sup>1</sup> Cf. *Parker v. Cousins*, *supra*, and *Utica Ins. Co. v. Tillman*, 1 Wend. 555.

<sup>2</sup> *Gebhart v. Sorrels*, 9 Ohio St. 461 ; *Nichols v. Levins*, 15 Iowa, 362 ; 44 Minn. 419 ; *Connor v. Donnell*, 55 Tex. 167.

<sup>3</sup> *Equitable Trust Co. v. Fowler*, 141 U. S. 384 ; *Drury v. Wolfe*, 34 Ill. App. 23. An agreement to pay periodically in advance the highest legal rate of interest for the use of money is not usurious. *Rose v. Munford*, 36 Neb. 148. And this, although the money loaned was not paid over to the borrower until after

interest began to run, provided the fault for such delay was that of the borrower. *Ib.*

<sup>4</sup> See *Noble v. Walker*, 32 Ala. 456 ; *May v. Campbell*, 7 Humph. 450 ; *Van Duzer v. Howe*, 21 N. Y. 531 ; *Gaul v. Willis*, 26 Penn. St. 259 ; *Metcalf v. Pilcher*, 6 B. Monr. 529 ; *Dickerman v. Day*, 31 Iowa, 444 ; *Maas v. Chatfield*, 90 N. Y. 1 ; *Colehour v. Savings Institution*, 90 Ill. 152 ; *Belden v. Lamb*, 17 Conn. 441 ; 72 Hun, 373. And see § 275, *post*. As between business and accommodation paper, see § 275.

and lend the sanction of business usage in advance of judicial interpretation. In principle, such sales correspond closely to the familiar transaction of purchasing coupon bonds or stock at market rates, whether above or below par; and the element of probable solvency enters into all such values.

§ 270. **Whether Charging for Exchange is Usurious.** — It is not usury to charge the customary market rates of exchange, where the loan is made in one place and is payable in another. But where, as is too frequently the case, this charge of exchange is a mere device and cover for usury, and the note is executed and payable at home, the transaction becomes usurious.<sup>1</sup> And while rates of "exchange" are usually as between one State or country and another, it is held not to be usurious for the lender of money to take advantage of the difference of exchange between the place of the loan and the place of the payment, where both places are within the State.<sup>2</sup>

§ 271. **Whether taking Gift, Bonus, Fee, etc., is Usurious.** — Usury is often taken in the shape of a gift or bonus; and where one lends money and simultaneously takes back part of the loan by way of a special premium, but without special consideration, this is a usurious device of the thinnest kind.<sup>3</sup> But as concerns compensation for special services, the repayment of expenses, attorney's fees, commissions, and the like, the rule may be otherwise, under some circumstances. In order that the extra allowance may not taint the whole transaction, it must be reasonable and proper, and stand for some real service distinct from the loan itself. A disguised gratuity inuring to the lender under the name of a commission will infect the contract of loan with usury; but for certain special services, which are well understood in the mercantile world, the lender who has rendered them in good faith is permitted to charge something in addition to the lawful rate of interest,

<sup>1</sup> *Price v. Lyons Bank*, 33 N. Y. 55; *Blyd*, 52; *Buckingham v. McLean*, 18 How. 151; *Durkee v. City Bank*, 18 Wis. 216.

<sup>2</sup> *Eagle Bank v. Rigney*, 33 N. Y. 613. And see *Kilgore v. Dempsey*, 25 Ohio St. 413.

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<sup>3</sup> See *N. Y. Dry Dock Co. v. American, &c. Co.*, 3 Sandf. Ch. 215; 48 Iowa, 385; *Lockwood v. Mitchell*, 7 Ohio St. 387; *Jarvis' Appeal*, 27 Conn. 432; *Grubb v. Brooke*, 47 Penn. St. 485; *Stark v. Sperry*, 6 Lea, 411; *Walter v. Foutz*, 52 Md. 147.

— as for accepting the drafts drawn by a customer, and purchasing supplies for him, — provided always that the charge be well founded and reasonable in amount.<sup>1</sup> And while the lender, who takes something above legal interest from the borrower under all such circumstances, is to be narrowly watched, there is no doubt that the reasonable charges of third persons in connection with the transaction are properly allowable; such as attorney's fees, or the commissions of a broker.<sup>2</sup> And whether all charges of this character are excessive or not will depend upon the ordinary rules.<sup>3</sup> What, it should be asked (though this may not be the full criterion), was the intention, and what were the motives of the parties at the time of the transaction.<sup>4</sup> A bonus paid by the borrower to his own agent for procuring a loan is no part of the sum loaned and raises no issue of usury.<sup>5</sup>

<sup>1</sup> See *Blyd*, 57; *Byrne v. Grayson*, 15 La. Ann. 457; *Beadle v. Munson*, 30 Conn. 175; *Corlies v. Estes*, 31 Vt. 658; *Jones v. McLean*, 18 Ark. 456.

<sup>2</sup> *Tallman v. Truesdell*, 3 Wis. 443; *Billingsley v. Dean*, 11 Ind. 331; *Smith v. Wolf*, 55 Iowa, 555; *Dayton v. Moore*, 30 N. J. Eq. 543.

<sup>3</sup> For an agent's act within the usual scope his principal is usually bound; but it appears that, if the agent of the lender takes a usurious bonus for himself without the lender's authority or knowledge, the contract is not thereby rendered usurious. See *Bell v. Day*, 33 N. Y. 165; 87 Ill. 513; *Austin v. Harrington*, 28 Vt. 130; *Rogers v. Buckingham*, 33 Conn. 81. Such is the pronounced rule of some States. *Van Wyck v. Watters*, 81 N. Y. 352; *Brigham v. Myers*, 51 Iowa, 397. Loan not made usurious by the fact that the borrower's agent receives a commission which he divides with the lender's agent. *Dickey v. Brown*, 56 Iowa, 426. Nor because an attorney, with the mortgagor's assent, deducts money to a reasonable amount from the principal of the mortgage for legal

services as to the title and drawing the papers, no part thereof being received by the mortgagee. *White v. Dwyer*, 31 N. J. Eq. 40; *Kihlholz v. Wolf*, 103 Ill. 362; 111 Ill. 506; 145 Ill. 421; 43 Minn. 517. Otherwise, *semble*, if the benefit enures directly to the lender. 103 Ill. 362. Money to a reasonable amount deducted from a loan and paid to the agent who secured the loan for the borrower does not constitute usury. *Goodwin v. Bishop*, 145 Ill. 421. But as to one procuring the loan who is the lender's agent, see *Ginn v. Mortgage Security Co.*, 92 Ala. 135.

<sup>4</sup> Fraud in obtaining extra sum from borrower as expense incurred in procuring loan, distinguished from usury. *Morton v. Thurber*, 85 N. Y. 550. Stipulation (*e.g.* in a mortgage) for the payment of attorney's fees in case of default and suit is not usurious. *Weatherly v. Smith*, 30 Iowa, 131; *Miner v. Paris Bank*, 53 Tex. 559; 82 Ala. 315. Nor is the agreement by the borrower to pay the tax instead of the lender. *Dubose v. Parker*, 13 Ala. 779.

<sup>5</sup> *Dryfus v. Byrnes*, 53 Fed. 410.

Sometimes a bonus or gratuity is really usurious, though taken rather by way of special advantage than as a direct payment in cash. Thus, where a loan of money is made to a corporation on condition that the lender shall be employed in some official position, which is in fact a sinecure, and shall receive a salary without rendering equivalent services, this is a mere usurious device, and the transaction is illegal; though sometimes a special contract of this sort might be separated from the loan, and pronounced invalid simply by itself.<sup>1</sup> So, too, an agreement to pay a lender a share of the business profits of the borrower in addition to principal and interest is usurious.<sup>2</sup> But not a *bond fide* contract to perform certain work for a corporation at specified prices and to receive payment in its bonds.<sup>3</sup> And though, under some circumstances, an agreement on a loan of money that the lender shall receive as recompense the rents and profits of land, might be deemed usurious, this will not be taken as a cover for usury unless the facts afford a very strong presumption of usurious intent, as where the rent is excessive.<sup>4</sup>

§ 272. **Rule of Usury applied to Banks.**—The business of discounting and charging rates of exchange on loans belongs especially to banks; and not only are the rights and liabilities of such corporations defined to a considerable extent by charter, but general legislation tends to place them upon a footing quite different from that of individuals, with privileges and restrictions entirely their own. Yet, in the absence of special statute provisions, it may fairly be supposed that general usury laws have the same application to banks as to natural persons.<sup>5</sup> To take interest in advance on loans has long been within the established rules of banking; but a bank cannot take more than legal rates upon a note after it has become payable, any more than an individual. Cases

<sup>1</sup> Griffin v. New Jersey, &c. Co., 3 Stockt. 49; Waite v. Windham, &c. Co., 87 Vt. 608. 298; Cross v. Hepner, 7 Ind. 359. As to usury under color of a lease, see Phelps v. Bellows, 53 Vt. 539.

<sup>2</sup> See Sweet v. Spence, 35 Barb. 44.

<sup>3</sup> White Water, &c., Co. v. Vallette, 21 How. 414.

<sup>4</sup> Sessions v. Richmond, 1 R. I.

<sup>5</sup> See Brower v. Haight, 18 Wis. 102; Niagara County Bank v. Baker, 15 Ohio St. 68; Farmers' Bank v. Burchard, 33 Vt. 346.

are not uncommon where a bank has violated the general usury laws and been held liable accordingly, to say nothing of charter restrictions upon its powers; and the question of usurious intent is here quite as material as in ordinary instances.<sup>1</sup>

Banks often give advantages to depositors which those desiring an occasional discount are not slow to discover. And if a person obtaining discounts voluntarily allows a sum to remain on deposit with the expectation that he may thus obtain discounts more readily, but without any agreement or understanding that he may not draw his money at any time, there can be no usury in the practice.<sup>2</sup> Even where there is a distinct understanding at the time of the discount that the bank shall receive the borrower's deposits, and an extra profit results in consequence, the courts appear reluctant to infer usury from that circumstance; though in a very hard and clearly established bargain they probably would.<sup>3</sup> Banks like individuals are sometimes entitled to compensation for collection of a draft; and it is held that where such charge is made in good faith and paid in advance, the transaction is not rendered usurious by the subsequent retention of the draft by the bank at the request of the drawer, and its payment at maturity without any deduction of the charge.<sup>4</sup> A bank may, by agreement, lawfully charge a customer with interest on his overdrafts in making up monthly balances.<sup>5</sup>

§ 273. **Rule of Usury as to the Loan of Productive Chattels.**

— To take collateral security on a loan is of course perfectly

<sup>1</sup> Thus, an arrangement by which one seeking a discount at a bank is required to obtain a discount of paper amounting to fifteen hundred dollars to secure the application to his use of one thousand dollars of the proceeds, without the right to use the remainder thereof except in payment of the paper discounted, when it shall become due, has been held usurious. *East River Bank v. Hoyt*, 32 N. Y. 119; *Rock, &c. Bank v. Woolscroft*, 16 Wis. 22. See *Belmont Branch Bank v. Hoge*, 35 N. Y. 65.

<sup>2</sup> *Appleton Bank v. Fiske*, 8 Allen, 201.

<sup>3</sup> See *Beals v. Benjamin*, 33 N. Y. 61. As to usury paid in dealings with a national bank, see *Driesbach v. Wilkesbarre Bank*, 104 U. S. Supr. 52; *Eates v. Montgomery Bank*, 100 U. S. Supr. 239; *Auburn Bank v. Lewis*, 81 N. Y. 15.

<sup>4</sup> *Central Bank v. St. John*, 17 Wis. 157.

<sup>5</sup> *Timberlake v. First Nat. Bank*, 43 Fed. 231. Charging a "banker's commission" specially under a loan, is a device for usury. 79 Md. 173.

proper ; and so, too, a party may lend stock as stock to be replaced, or he may lend the produce of it as money, or he may give the borrower the option to repay either in one way or the other. But he cannot legally reserve to himself the right to determine which it shall be. A loan of stock to be replaced at a future day with its dividends is a transaction where the lender takes the risk of depreciation in the meantime, and this is lawful ; but to lend the produce of stock with an agreement that it shall be returned as so much money, while reserving the dividends by way of interest, this is usurious, if the dividends amount to more than the legal rate on the produce of the stock. The collateral advantage which the lender here seeks to enjoy is usurious ; for it is a cover for getting a usurious rate of interest on a loan of money.<sup>1</sup> Where animals are sold or loaned, as is sometimes the case, with a reservation of increase, like considerations of usury sometimes arise ; and such transactions are sustainable, where it does not appear that a loan of money is disguised under the name of a loan or sale by way of *mutuum* of live stock.<sup>2</sup> A loan of corn to be returned in kind may be good, regardless of the per cent in amount which is to be added ; for this is a *mutuum*.<sup>3</sup>

§ 274. **Various Usurious Devices.** — Another trick sometimes attempted is that of forcing goods upon the borrower, in connection with the loan, at an estimate far above their true worth, instead of making a cash loan for the full amount. To distinguish between the legal and illegal here is not easy ; and each case must depend somewhat upon the willingness or reluctance of the borrower to take the goods, the hardness of the bargain, and other facts which serve to manifest what the law deems an usurious intent.<sup>4</sup> Thus, the issue being

<sup>1</sup> See Blyd. Usury, 45-47 ; Tate v. Wellings, 3 T. R. 531 ; Cleveland v. Loder, 7 Paige, 557.

<sup>2</sup> See Gilmore v. Ferguson, 28 Iowa, 220 ; Bull v. Rice, 1 Seld. 315. If the lender to an adventure receives a share of the profits, usury cannot be alleged, provided he were responsible

under the terms of the contract for losses. Goodrich v. Rogers, 101 Ill. 523.

<sup>3</sup> Easterlin v. Rylander, 59 Ga. 292. And see 4 Baxter, 86.

<sup>4</sup> Blyd. Usury, 42-45, and cases *infra*.

mainly one of fact in each case, where a certain sum is loaned, and as part of the same transaction the borrower purchases a mill, giving much more than it is worth, both parties knowing the facts at the time, the transaction may be pronounced usurious, even though nothing special was said as to the real value of the mill.<sup>1</sup> And a contract for labor or for commodities at an unfair price, when made as the condition of the loan, may render the loan usurious.<sup>2</sup> So, too, where the lender makes the borrower give him, before receiving all the money, his wagon at a depreciated value.<sup>3</sup> A fair criterion by which to detect usury in all such cases is to compare the market value of the goods with the gain to the lender in charging and obtaining more than the market value.<sup>4</sup> We here suppose that the apparently external harsh arrangement is part of the loan transaction itself, and not entirely distinct, so as to stand or fall on its own merits.

To make a loan in depreciated bank-notes, expecting to receive payment in money at par, would not generally constitute usury; certainly not where the parties acted in good faith.<sup>5</sup> Nor necessarily would the transfer of a debt at par coupled with a loan of money, though the debt afterwards prove uncollectible. Yet even here the facts might be such as to taint the whole transaction. And the same may be said of a transfer of our modern securities, which might amount to a fair sale of them on credit or an usurious loan, according to circumstances.<sup>6</sup>

An exchange of negotiable obligations to raise money, and

<sup>1</sup> *Low v. Prichard*, 36 Vt. 183. And see *Miller v. Bates*, 35 Ala. 580; *Tarleton v. Emmons*, 17 N. H. 43; *Heath v. Page*, 48 Penn. St. 130; 88 Ill. 566.

<sup>2</sup> See *Root v. Pinney*, 11 Wis. 84; *Parker v. Maxwell*, 51 Minn. 523; 49 Minn. 111; *Roger v. O'Neal*, 33 W. Va. 159.

<sup>3</sup> *Cummins v. Wire*, 2 Halst. Ch. 73.

<sup>4</sup> See *Mumford v. American, &c. Insurance Co.*, 4 Comst. 463; *Collier v. Barr*, 64 Ala. 543.

For application of this rule to

an agreement to pay insurance premiums, see 1 *McCrary*, 234; *Braynard v. Hoppock*, 32 N. Y. 571. As to an agreement concerning stock of the corporation which lent the money, see 48 Md. 455.

<sup>5</sup> See *Hayward v. Le Baron*, 4 Fla. 404; *Gregory v. Bewley*, 4 Eng. 22.

<sup>6</sup> *Brown v. Nevitt*, 27 Miss. 801; *Thomas v. Murray*, 32 N. Y. 805; *Bank of Washington v. Arthur*, 3 Gratt. 173; *Dean v. Herrick*, 54 Vt. 573; § 275.

so made, is a loan within the usury laws; and if by such exchange the amount ultimately to be paid by the borrower is greater than that to be paid by the lender, and it is one loan transaction, there is generally usury.<sup>1</sup> But we presume that premiums, commissions, and the like may be stipulated for, as in other cases. Making out the borrower's note for a larger sum than the lender advanced or antedating it, is a palpable device for usury.<sup>2</sup>

§ 275. *Distinctions as to the Purchase and Sale of Commodities.* — And this brings us to an inquiry which the courts and legislatures have not as yet fully answered; namely, where shall the line be drawn between a usurious loan and a *bona fide* sale or exchange of commodities at a profit exceeding the interest rates, — the one transaction being illegal and the other perfectly legal. In our later cases this subject is discussed frequently, and as to most of the wealthier States the courts seem disposed to shield parties from the harsh consequences of usury as far as possible.<sup>3</sup> It has been well said that in every instance where the contract is in form one of sale or exchange, if the court, in looking at the whole transaction, can see that the value secured to the vendor was in good faith, only the price of the thing sold or exchanged by him, there can be no usury, whatever the price may be or the mode in which it may be reserved.<sup>4</sup> And it is certainly a familiar rule that the seller of goods may ask one price in cash and a higher price on credit. But in order to render a transfer valid, on any such ground, the sale must be fair and honest and above board; and the substance of the transaction, not the form of words, is to be regarded by the court.<sup>4</sup>

<sup>1</sup> See *Hyde v. Finley*, 26 Miss. 468; *Nickerson v. Babcock*, 23 Ill. 561; *Schermerhorn v. Talman*, 14 N. Y. 93. Whether a loan payable either in gold coin or in currency with the premium on gold, is, in times of legal tender currency, usurious, see *Gates v. Hackenthal*, 57 Ill. 534. But where A. owes B., and B. owes C., an agreement between A. and C. that C. should give B. further time

upon a payment of extra interest by A. is not usurious. *Gleason v. Childs*, 52 Vt. 421.

<sup>2</sup> See 44 Minn. 121; *Vail v. Van Doren*, Neb. (1895).

<sup>3</sup> See *Gardiner, J.*, in *Dry Dock Bank v. American, &c. Co.* 3 Comst. 344, 359. And see *supra*, § 269; 94 Tenn. 17.

<sup>4</sup> See *Beets v. Bidgood*, 7 B. & Cr. 453; *Leavitt v. De Launy*, 4 Comst.



Inquiries of this sort are usually raised on the transfer of bills and notes; and a distinction may here be made between business and accommodation paper. Where a note is made without consideration, and merely to enable the payee to raise money upon it, the maker is not bound by it until it has been negotiated; and if the payee gets it discounted at a greater rate than the lawful interest, the transaction is regarded as a loan by the indorsee and *prima facie* usurious.<sup>1</sup> But a sale of bills and notes at a discount exceeding the legal rates would not be usurious if the transaction proved not to be a cover for a loan.<sup>2</sup> And it appears to be now well settled that a bill or note valid in its inception and binding between the original parties, and in fact all negotiable paper in the hands of those who have taken it by way of business and not accommodation, may be purchased in good faith as a marketable commodity at any rate of discount, though practically exceeding legal interest.<sup>3</sup> So a debtor may purchase debts due from his creditor to others at a greater discount than legal interest, and demand a set-off to the full amount with legal interest.<sup>4</sup> It is not a usurious transaction to purchase below par, railroad, municipal, or other negotiable bonds, bearing interest periodically due; even though bought directly from the government or corporation in question at such a discount from their face.<sup>5</sup>

§ 276. **Usury with Reference to a Former and Latter Loan.** — A party in making a further loan may insist upon

364; *Newman v. Williams*, 29 Miss. 212; *Vail v. Heustis*, 14 Ind. 607.

Where goods were bought on a stated credit, and at the expiration of that period the buyer gave his note for the aggregate amount, with interest as from the date of purchase, the transaction was held usurious. *White v. Friedlander*, 35 Ark. 52. Cf. *Ford v. Hancock*, 36 Ark. 248.

<sup>1</sup> *Tufts v. Shepherd*, 49 Me. 312; *Richardson v. Scobee*, 10 B. Monr. 12; *Whitten v. Hayden*, 7 Allen, 407; *Belden v. Lamb*, 17 Conn. 441. The sale of accommodation paper at a discount greater than legal interest

is usurious and void under New York statutes. *Clafin v. Boorum*, 122 N. Y. 385.

<sup>2</sup> *Durant v. Banta*, 3 Dutch. 624; *Otto v. Durege*, 14 Wis. 571. See *Atwell v. Gowell*, 54 Me. 358; *Bayliss v. Cockroft*, 81 N. Y. 363.

<sup>3</sup> *Newman v. Williams*, 29 Miss. 212; *Corcoran v. Powers*, 6 Ohio St. 19; *Williams v. Reynolds*, 10 Md. 57. And see *Kitchel v. Schenck*, 29 N. Y. 515; *Dickerman v. Day*, 31 Iowa, 444.

<sup>4</sup> *Young v. Miller*, 7 B. Monr. 540.

<sup>5</sup> See *City of Memphis v. Bethel*, Tenn. (1892).

security for a former loan, and may even make the giving of such security a condition of the new loan, and yet the loan is not necessarily usurious in consequence. The question in such a case is, whether the object was in reality to get security for the old debt, or only to make a loan with such security as a usurious premium.<sup>1</sup>

§ 277. **Usury consists in Actual Taking.** — In absence of controlling words in local statutes to the contrary, the offence of usury may be said to consist not in the attempt to take, but in the actual taking of more than the legal rate of interest. And, as a general rule, the offence of usury is not consummated until a lender has received more than principal and interest, bonus included, for the sum actually advanced.<sup>2</sup> But this is not an invariable rule, for the language of legislation varies in different States.

§ 278. **Usury, who may plead, etc.** — It is a general rule that usury is a personal defence, and cannot be set up by a stranger; in other words, that no person, unless legally implicated in the usurious transaction, or having a legal interest in the property subject thereto, can interpose such a plea. For it is a general principle that a mere stranger has no right to intermeddle with the concerns of others. And one very good reason why the rule should be thus applied is that, notwithstanding the general policy of the usury laws, the courts leave the borrower free to waive such a defence, and stand by his contract if he chooses to do so.<sup>3</sup>

The borrower, then, and his heirs and personal representatives, may set up the defence of usury.<sup>4</sup> But the borrower cannot transfer to another the right to plead usury which is in himself.<sup>5</sup> Nor can he set up usury paid by a third person in connection with the transaction.<sup>6</sup> And an assignment by

<sup>1</sup> See *Jarvis' Appeal*, 27 Conn. 432; *Saunders v. Lambert*, 7 Gray, 484.

<sup>2</sup> See *Brestle v. Mehaffie*, 19 Penn. St. 117; *Mitchell v. Doggett*, 1 Branch, 356.

<sup>3</sup> See *Blyd. Usury*, 106, 107; *Livingston v. Harris*, 11 Wend. 329; *People's Savings Bank v. Collins*, 27

Conn. 142; *Pritchett v. Mitchell*, 17 Kan. 355; 13 Oreg. 523; *Moses v. Loan Association*, 100 Ala. 465.

<sup>4</sup> *Ib.*

<sup>5</sup> *Bullard v. Raynor*, 30 N. Y. 197; *Cain v. Gimon*, 36 Ala. 168; 15 Hun, 564.

<sup>6</sup> *McArthur v. Schenck*, 31 Wis. 673.

a debtor in trust to pay a certain usurious debt cannot be avoided by a creditor of the assignor upon the ground that the debt thereby secured was usurious, though it is otherwise with a judgment creditor who has acquired a legal lien upon the property encumbered by the usurious security. And we need hardly add that a lender cannot avoid his own usurious contract on the ground of his own usury.<sup>1</sup>

Privies in law of the debtor, as the assignee in bankruptcy or the sheriff in execution, may usually, it would appear, set up the plea of usury against his unpaid debts; though not so as to recover illegal interest which the debtor has already paid.<sup>2</sup>

A surety of the borrower in the usurious contract, who has not been repaid, and whose conduct has been honest, is entitled to the defence of usury; also bail of the borrower; also a joint obligor.<sup>3</sup> But where B. borrows from A., and gives him two bonds, on one of which C. is surety, and afterwards pays the other bond on which usurious interest was reserved, C. cannot avail himself of the payment of such usurious interest in defence of an action on the bond in which he is surety.<sup>4</sup> And if a surety to a usurious contract pays usurious interest, knowing it to be such, he cannot recover it again from his principal.<sup>5</sup> A usurious contract giving the principal debtor indulgence in payment will not discharge his surety, though carried out afterwards, if the law makes such contracts illegal and void.<sup>6</sup>

Where an executor or administrator loans the money of his intestate at a usurious rate of interest, the debtor may make the same defence as if the money had belonged to the administrator as an individual.<sup>7</sup> Fiduciary officers of this character are responsible, as such, for usury received by the deceased in his lifetime; but it seems certain that they can-

<sup>1</sup> *Riley v. Gregg*, 16 Wis. 666; *Carter v. Dennison*, 7 Gill, 157.

<sup>2</sup> See *Morse v. Crofoot*, 4 Comst. 114; *Lee v. Fellowes*, 10 B. Monr. 117. But see *Low v. Prichard*, 36 Vt. 183.

<sup>3</sup> See 12 Mod. 193; *Goodhue v.*

*Palmer*, 13 Ind. 457; *Kirkpatrick v. Wherritt*, 7 B. Monr. 388; *Safford v. Vail*, 22 Ill. 327.

<sup>4</sup> *Cantey v. Blair*, 2 Rich. Eq. 46.

<sup>5</sup> *Jones v. Joyner*, 8 Geo. 562.

<sup>6</sup> *Gilder v. Jeter*, 11 Ala. 256.

<sup>7</sup> *Norcum v. Lum*, 33 Miss. 299.

not, if innocent, be made to suffer personally the penal consequences.<sup>1</sup>

§ 279. *The Same Subject.*—Usury is a defence to a suit to foreclose a mortgage, just as it is upon the usurious note which secures it; and any one claiming under a mortgagor and in privity with him may raise the defence of usury in the mortgage.<sup>2</sup> But a subsequent mortgagee cannot take advantage of usury in a prior mortgage, since he is a stranger and not a privy to it, and cannot be injuriously affected by enforcement of the contract.<sup>3</sup> And the same holds true in general of the subsequent grantee of premises subject to a usurious mortgage,—or at least of one who purchases the equity of redemption, or who agrees to assume the mortgage as part of his consideration; since, as to the right of a general grantee, under such circumstances, there appears some uncertainty.<sup>4</sup> Such rules are often controlled by legislation; and it must be considered that a court of equity proceeds upon its own equitable theory, where its jurisdiction is invoked.<sup>5</sup> But in New York the *bond fide* purchaser, under a statute foreclosure of a mortgage which was tainted with usury, acquires a good title.<sup>6</sup>

The statutes of some States expressly prohibit corporations, and especially banks, from interposing the defence of usury.<sup>7</sup> And in a controversy as to the validity of a levy of execution upon a corporation, a stockholder cannot object on the ground of usury.<sup>8</sup>

<sup>1</sup> See *Proctor v. Terrill*, 8 B. Monr. 451; *Heath v. Cook*, 7 Allen, 59.

<sup>2</sup> *Wright v. Bundy*, 11 Ind. 398; *Ramsay v. Warner*, 97 Mass. 8; *Brooks v. Miller*, 1 Stockt. 807.

<sup>3</sup> *Churchill v. Cole*, 32 Vt. 93; *Rexford v. Widger*, 3 Barb. Ch. 640; *Pritchett v. Mitchell*, 17 Kan. 355.

<sup>4</sup> *Post v. Bank of Utica*, 7 Hill, 391; *Sands v. Church*, 6 N. Y. 347; *Cramer v. Lepper*, 26 Ohio St. 59; *Hough v. Horsey*, 36 Md. 181; *Burlington Loan Association v. Heider*, 55 Iowa, 424. The maker of a note secured by mortgage should not, after such conveyance, set up usury in a

suit which seeks no personal judgment against him. 52 Iowa, 354. But see *Newman v. Kershaw*, 10 Wis. 333. And see *Dolman v. Cook*, 1 McCart. 56; *Gunnison v. Gregg*, 20 N. H. 100.

<sup>5</sup> See § 282, *post*.

<sup>6</sup> *Jackson v. Henry*, 10 Johns. 185.

<sup>7</sup> See *Schermerhorn v. Talman*, 14 N. Y. 93; *Rosa v. Butterfield*, 33 N. Y. 665; *Hartford, &c. Ins. Co. v. Hadden*, 28 Ill. 260. And see *Bach v. Lanman*, 24 Penn. St. 435.

<sup>8</sup> *Chaffin v. Cummings*, 37 Me. 76. As to plea by the surety of a corporation, see 35 N. J. 285.

The accommodation indorser of a note may, like any surety, take advantage of the plea of usury, as well as the borrower;<sup>1</sup> and so may any indorser when charged upon the note, if not chargeable with bad faith.<sup>2</sup> And the indorsee who takes a note with notice that it is tainted with usury takes it subject to that defect; so that where accommodation paper in any form is discounted by a party knowing its true character, the defence of usury may be set up between the parties to the paper and the party by whom it is originally discounted.<sup>3</sup> As to whether the plea of usury may be set up against *bonâ fide* holders for value, the rule is not uniform; and it may depend somewhat upon local statutes, which are frequently explicit in this respect. Thus usury makes "void" according to some State codes; while in others the penalty is far less severe.<sup>4</sup> In some States usury is deemed a good defence for the maker of business paper *pro tanto*, though the note be in the hands of an innocent holder for value, who has received it in the ordinary course of business; but the better opinion is that the plea is not available under such circumstances, in the absence of a positive statutory provision to that effect.<sup>5</sup>

But where a debtor gives a new security for a usurious debt, to the *bonâ fide* assignee of the debt, who took the original debt and takes the substituted security without any knowledge of the usury, such debtor cannot afterwards set up usury as a defence to the substituted paper.<sup>6</sup> And if the maker of a usurious note gets a third person, who had no

<sup>1</sup> See *Gray v. Brown*, 22 Ala. 262.

<sup>2</sup> And this, even though, ignorant of the usury, he has given his own note. *First Nat. Bank v. Plankinton*, 27 Wis. 177.

<sup>3</sup> *Simpson v. Fullenwider*, 12 Ired. Eq. 334; *Veazie Bank v. Paulk*, 40 Me. 109; *Clark v. Sisson*, 22 N. Y. 312.

<sup>4</sup> See *Claffin v. Boorum*, 122 N. Y. 385, which turned upon the statute expression "void."

<sup>5</sup> See *William v. Wilder*, 37 Vt. 613; *Tucker v. Wilamowicz*, 3 Eng.

157; *Kendall v. Robertson*, 12 Cush. 156; *Bacon v. Lee*, 4 Iowa, 490; *Cutchen v. Coleman*, 13 Ind. 568. The *bonâ fide* holder of a note given for usurious interest who purchases for less than its face value may recover only the actual consideration paid, together with legal interest. *Cheney v. Campbell*, 28 Neb. 376.

<sup>6</sup> See *Cuthbert v. Haley*, 8 T. R. 390; *Dix v. Van Wyck*, 2 Hill, 522; *Houghton v. Payne*, 26 Conn. 396. And see *Wendlebone v. Parks*, 18 Iowa, 546.

connection with it, to give his note which is free from usury for the amount in payment of the usurious note, this third party cannot afterwards defend on the plea of usury between the former parties; though it would probably be otherwise if this note had been given not in payment, but as a mere renewal or substitution for the original usurious note.<sup>1</sup>

§ 280. **The Same Subject.** — Upon the whole, then, as to parties entitled to plead usury, while the question is often dependent upon the legislation and public policy of each State, and it is impossible to lay down a rule which may completely reconcile all the cases, it may be stated that the right to set up such a defence depends mainly upon the character of the party as the original borrower or his legal representative and substitute, or else upon the party's liability to prejudice or injury through the enforcement of the usurious contract. And even where usury may be pleaded, the defence must be seasonably made; for lapse of time, especially when actual benefits have been taken by the party under the contract alleged to be usurious, or he has otherwise by his conduct manifested an intent on his part to waive the defence of usury, proves a fatal barrier.<sup>2</sup>

§ 281. **Usury, how to be pleaded and proved.** — Usury, too, is a defence which, as a general rule, must be strictly proved; and the court will not presume a state of facts to sustain that defence where the instrument is consistent with correct dealing. Hence, it is held that a note dated on one day for a sum payable with interest from a day previous, will be deemed *prima facie* a note given subsequently for a loan which was actually made on the former date.<sup>3</sup> Nor will it avail the party to prove usury if the case of usury proved is not that set up in defence; nor to make out a case which leaves to conjecture and does not prove usury. Usury must

<sup>1</sup> Hanley v. Kempton, 30 Me. 118, long v. Pearce, 51 Me. 299. But see and cases cited. And see Macungie Bank v. Hottenstein, 89 Penn. St. 328. Kendig v. Marble, 55 Iowa, 386.

<sup>2</sup> See Davis v. Converse, 35 Vt. 503; Smith v. Marvin, 27 N. Y. 137; Lucas v. Spencer, 27 Ill. 15; Fur-

<sup>3</sup> See Marvin v. Feeter, 8 Wend. 533; Ewing v. Howard, 7 Wall. 499; Andrews v. Hart, 17 Wis. 307; Wetter v. Hardesty, 16 Md. 11.

in general be specially pleaded ; and the corrupt agreement must be distinctly set out and must be proved as alleged.<sup>1</sup> This doctrine prevails both in law and in equity; though in the action of assumpsit at law every defence which shows that the plaintiff never had any cause of action may be given in evidence under the general issue.<sup>2</sup> But the manner in which usury must be pleaded and proved is to be determined by the statute in force at the time of suit ; and the practice of the different States is not altogether uniform in this respect. In many cases the party pleading usury must first tender to the usurer the amount admitted to be due ; and yet the formality of tender is now frequently dispensed with ; and it seems to have always been rather a requirement of equity than the law courts.<sup>3</sup>

§ 282. *Usury as a Defence in Chancery.* — As a general rule relief cannot be obtained in equity against usury where the party has omitted to plead it at law and shows no excuse for the failure ; nor will a bill of discovery be entertained in chancery after judgment at law, where the facts sought to be elicited are matters of legal defence, and no excuse is offered for not having shown it earlier.<sup>4</sup> And usury paid, under a decree in chancery, cannot be recovered again by a suit in chancery.<sup>5</sup>

§ 283. *Legal Consequences of Usury.* — The legal consequences of usury were under the old statutes very disastrous.

<sup>1</sup> *New Jersey, &c. Co. v. Turner*, 1 McCart. 326 ; *Vroom v. Dittmas*, 4 Paige, 526 ; *Manning v. Tyler*, 21 N. Y. 567 ; *Frank v. Morris*, 57 Ill. 138 ; *Omaha Hotel Co. v. Wade*, 97 U. S. 13 ; 98 U. S. 50.

<sup>2</sup> *Ib.* ; *Comyn Usury*, 201-203 ; *Holland v. Chambers*, 22 Geo. 193 ; *Stockham v. Munson*, 28 Ill. 51 ; *Bond v. Worley*, 26 Mo. 253.

<sup>3</sup> *Kuhner v. Butler*, 11 Iowa, 419 ; *Newman v. Kershaw*, 10 Wis. 333. And see *Heath v. Page*, 48 Penn. St. 130. An agreement not to plead usury or to withdraw the plea is against public policy and void. 22 Hun, 264. But our later courts disincline to per-

mit such plea to be waived or withdrawn, and then reasserted. *Clark v. Spencer*, 14 Kan. 398 ; *St. Albans Bank v. Wood*, 53 Vt. 491. A sealed release of all claims for usury, executed at the time of the usurious transaction, is a mere subterfuge, and does not bar a subsequent plea of usury. *Herrick v. Dean*, 54 Vt. 568.

<sup>4</sup> *Jones v. Kirksey*, 10 Ala. 579 ; *Smith v. Walker*, 8 S. & M. 131 ; *Brown v. Swann*, 10 Pet. 497 ; *Blyd. 117*. See *Busby v. Finn*, 1 Ohio St. 409.

<sup>5</sup> *Thompson v. Ware*, 8 B. Monr. 26. See § 285, *post*.

Every contract which was founded in usury was treated as *ipso facto* void, and the contract and security became, to borrow the usual phrase, extinct at its very inception.<sup>1</sup> But public opinion in the matter of usury laws has so greatly changed during the last half century, and legislation with it, that to know truly what are the legal consequences in any particular State, — if indeed usury remains a legal offence with penal consequences at all, — we must consult the latest statutes. In England and in certain parts of this country the usury laws are abolished.<sup>2</sup> Some States, which still hesitate to wipe them out altogether, connive at a reform by making the penalties so light that the borrower would seldom find it advantageous to carry his grievance to the court. The favorite rule in many States is to make a contract tainted with usury void only to the extent of the illegal interest reserved therein, and enforceable for the residue; or, in other words, to allow the principal and legal interest to be taken by the lender.<sup>3</sup> Another rule, also sanctioned by legislation in some localities, is to impose, as a penalty for usury, the forfeiture of all interest accruing subsequently to the usurious contract, so that the lender may recover his principal and no more.<sup>4</sup> This, though not perhaps so fair as the preceding rule, has the advantage of imposing a penalty sufficient to discourage somewhat the practice of usury, without being very harsh. But in other States the penalty is more severe; as twice or threefold the usury reserved; or, again, ten per cent on the amount loaned.<sup>5</sup> It is not unusual to provide that the penalty thus imposed may be sued and recovered; and sometimes the State shares the proceeds with the prosecutor, turning, perhaps, its share into the school fund.<sup>6</sup>

<sup>1</sup> 1 Mod. 69; Blyd. Usury, 86. This consequence is not to be upheld by the court where the language of the statute leaves a reasonable doubt. *Eates v. Montgomery Bank*, 100 U. S. 239.

<sup>2</sup> See *supra*, § 251; Bouv. Dict. "Usury."

<sup>3</sup> See *Smith v. Stoddard*, 10 Mich. 148; *Veazie Bank v. Paulk*, 40 Me. 109.

<sup>4</sup> See *Saltmarsh v. Planters', &c. Bank*, 17 Ala. 761; 98 U. S. 50; *Mapps v. Sharpe*, 32 Ill. 13; *Fisher v. Bidwell*, 27 Conn. 363.

<sup>5</sup> See *Hart v. Goldsmith*, 1 Allen, 145; 81 N. Y. 15; 49 Wis. 697.

<sup>6</sup> See Bouv. Dict. "Interest," and Statutes of Iowa, &c., cited; *supra*, § 267. A mortgage or note in *part* usurious may be void *in toto*; but a



New York leads the small remnant of States where usury still makes the contract void ; but in its courts the rigor of this statute is mitigated to some extent ; and not only is the doctrine of a *bond fide* sale of negotiable paper strongly upheld in that State, but it is a well-settled doctrine that the debtor need not avail himself of the usury laws. And where one assigns or appropriates property in trust for the payment of usurious debts, the trust is irrevocable.<sup>1</sup>

§ 284. **The Same Subject; Effect of Voluntary Payment.** — It is a well-established principle of the common law that payments voluntarily made by a party having knowledge of the facts cannot be recovered again. This principle is frequently applied to usurious contracts ; and if a party voluntarily pays his debt and usurious interest upon it, he cannot maintain an action to get his money back again.<sup>2</sup> To completely perform a usurious contract under such circumstances is to terminate all controversy over it. And it is held, still further, that where usury has been voluntarily paid, and applied by agreement of parties as extra interest, it cannot even be set off against the principal debt afterwards.<sup>3</sup> But it is now provided by law in many States that the borrower may sue to recover the excess paid beyond the principal and lawful interest due, notwithstanding the payment was voluntary on his part ; and where this is the case, and usury does not avoid the principal and legal interest, the disposition is to avoid multiplicity of actions, and allow the borrower the right to treat payments of usurious interest made by him as payments on account of the principal and legal interest so long as the debt remains unsettled ; and if he be sued on his debt, he is likewise permitted to make the defence of usury *pro tanto*, and have the penalty set off against the amount payable.<sup>4</sup>

valid debt included in the note stands on its original merits. *Marks v. McGehee*, 35 Ark. 217.

<sup>1</sup> *Murray v. Judson*, 5 Seld. 78. But as to accommodation paper the judicial rule is very strict, even as against *bond fide* holders. See 122 N. Y. 385 ; § 279.

<sup>2</sup> *Tompkins v. Hill*, 28 Ill. 519 ; *Smith v. Coopers*, 9 Iowa, 376 ; *Coon v. Swan*, 30 Vt. 6 ; *Smith v. Marvin*, 27 N. Y. 137.

<sup>3</sup> *Graham v. Cooper*, 17 Ohio, 65.

<sup>4</sup> See *Ellis v. Brannin*, 1 Dudley, 48 ; *Lockwood v. Mitchell*, 7 Ohio St. 387 ; *Root v. Pinney*, 11 Wis. 84 ;

And while the payment of usury upon a note is at law deemed a part payment of the note when the note includes both the money loaned and the usury, yet if separate securities are given for the usury, and the usury is applied to them, the debtor is at liberty to treat the payment as having no connection with the legal demand, and may sue for its recovery.<sup>1</sup>

§ 285. *Rule of Equity as to the Consequences of Usury.*—Statutes of usury are usually to be considered as binding in a court of chancery, and equity will follow the law in construing them. But when any borrower comes into a court of equity to obtain relief against a usurious contract or transaction, he is compelled to pay or offer to pay the principal sum with legal interest; this on the ground that he who seeks equity must do equity.<sup>2</sup> This rule is quite commonly applied in proceedings brought to foreclose a mortgage. And yet in some States the mortgagor, in a foreclosure suit, is entitled to the benefit of the statute penalty for usury in reduction of the sum for which conditional judgment is entered.<sup>3</sup> In general, equity applies usurious part-payments towards the discharge of principal and lawful interest; and it favors neither borrower nor lender especially, but seeks to do exact justice between them; relieving the one from the harsh consequences of his imprudent bargain, and giving back to the other all the

*Wheatley v. Waldo*, 36 Vt. 237; *Holmes v. Gerry*, 55 Me. 299; *Cross v. Mann*, 53 Vt. 501; *Payne v. Newcomb*, 100 Ill. 611.

<sup>1</sup> *Nichols v. Bellows*, 22 Vt. 581. As to judicial application of payments made by the debtor without specifying how they are to be applied, where usurious interest was reserved, see *Woolley v. Alexander*, 99 Ill. 188; *Saunders v. Lambert*, 7 Gray, 484.

A third party cognizant of the facts of usury, such as the assignee of a mortgage or releasee, takes with the original equities in favor of the lender. *Wells v. Robinson*, 53 Vt. 202. And see *supra*, § 278. But one who bor-

rows money of another at a legal rate of interest to pay a usurious debt cannot plead usury against the new creditor by showing that he knew the old debt to be usurious. *Mason v. Searles*, 56 Iowa, 532.

<sup>2</sup> See *Ware v. Thompson*, 2 Beasl. 66; *Ruddell v. Ambler*, 18 Ark. 369; *Conner v. Myers*, 7 Blackf. 337; *Balinger v. Edwards*, 4 Ired. Eq. 449; 82 N. C. 134.

<sup>3</sup> See *Minot v. Sawyer*, 6 Allen, 78; *Divoll v. Atwood*, 41 N. H. 446. And see *Grow v. Albee*, 19 Vt. 540. But the debtor cannot apply the penal deduction for himself. *McNeal v. Leonard*, 1 Allen, 399.

money that he advanced with a fair rate of compensation for the use of it.<sup>1</sup>

§ 286. **Effect of Usury as between Principal Debt and Security.** — The securities which follow or grow out of a usurious transaction must bear the consequences of the usury; and whether these securities be real or personal, they go with the debt to which they are collateral.<sup>2</sup> But where a valid claim is embraced in a subsequent security which is void for usury, the effect is to make the latter security illegal and void, and leave the naked claim as it stood before; for, the original contract being lawful, no subsequent taking or contracting to take illegal interest will render it usurious.<sup>3</sup> This distinction is, of course, to be reasonably applied; and a mere device, such as taking separate notes for principal and interest, will not operate so as to relieve a contract from the consequences of usury, if the fact be shown that the promise to pay interest constituted a part of one entire contract for the loan of principal and interest.<sup>4</sup>

§ 287. **Usury as a Criminal or Penal Offence.** — Not only is the taking of unlawful interest visited by law with the consequences already enumerated, but in some States it is even punishable by indictment as a criminal or penal offence.

<sup>1</sup> See *Spain v. Hamilton*, 1 Wall. 604; *Smith v. Hollister*, 1 McCart. 153; *McAllister v. Jerman*, 32 Miss. 142; *Smith v. Robinson*, 10 Allen, 130; *Woolley v. Alexander*, 99 Ill. 188; 12 Neb. 504. A mortgagor cannot obtain an injunction against a foreclosure sale on the ground of usury, unless he tenders the sum borrowed, with lawful interest. *Anthony v. Lawson*, 34 Ark. 628.

<sup>2</sup> *Hodkinson v. Wyatt*, 4 Q. B. 749; *Langton v. Haynes*, 37 E. L. & Eq. 590; *Price v. Lyons Bank*, 33 N. Y. 55; *Corcoran v. Powers*, 6 Ohio St. 19.

<sup>3</sup> *Cook v. Barnes*, 36 N. Y. 520; *Blyd. Usury*, 97, 102; *Mitchell v. Doggett*, 1 Fla. 366. A. advanced money to pay a mortgage, taking

another mortgage to secure the advance. The second mortgage was declared void for usury. *Held*, that the usury did not affect the first mortgage; and the second mortgage being void, the first mortgage revived and could be enforced by A. *Patterson v. Birdsall*, 64 N. Y. 294. And see *Pritchett v. Mitchell*, 17 Kan. 355; *Richardson v. Baker*, 52 Vt. 617. A judgment obtained on a mortgage given as security for a bond which is claimed to have included a debt and usurious interest is held conclusive in *Carlisle v. Bindley*, 91 Penn. St. 229.

<sup>4</sup> See *Gray v. Brown*, 22 Ala. 262; *Goodrich v. Buzzell*, 40 Maine, 500; *Brown v. Nevitt*, 27 Miss. 801.

But prosecutions, under such rigorous laws, are found much less frequent than the transgression ; and courts seem disposed to construe such statutes quite strictly.<sup>1</sup>

§ 288. **Conflict of Laws relating to Interest and Usury.** — Generally, interest, whether due by express contract, or given by law as damages, is to be computed according to the legal rate of the State or country where the contract is made or performed, on the usual principles which prevail in a conflict of laws ; and in the absence of attempted evasion of the usury laws, parties are free to choose for themselves between the rate of the “place of contract” or that of the “place of performance,” and contract accordingly.<sup>2</sup> But the parties who mean to stipulate according to rates other than those prevailing in the State where the contract is given should indicate their intention clearly.<sup>3</sup> Moreover, a State jurisdiction where the remedies of enforcement are sought, as, for instance, in foreclosure of a mortgage given as security, will sometimes insist upon its own statute policy.<sup>4</sup>

§ 289. **Constitutional Questions ; Law in Force at Date of Transaction.** — So, too, the law in force at the time when the usurious contract is made will usually govern with regard to the consequences of usury ; and this, too, though the statute may have been repealed before suit was brought.<sup>5</sup> But, as it has been observed in a Connecticut case, “the parties to usurious contracts hold any right they can be presumed to hold to the penalties given by the law, subject to a modification or repeal by the legislature which may destroy them, and a consequent direct or indirect validation of their contracts.”<sup>6</sup>

<sup>1</sup> See *State v. Tappan*, 15 N. H. 91 ; *Gillespie v. State*, 6 Humph. 164 ; *Block v. State*, 14 Ind. 425 ; *Agnew v. McElhane*, 18 Penn. St. 484.

<sup>2</sup> See *Miller v. Tiffany*, 1 Wall. 298 ; *Roberts v. McNeeley*, 7 Jones, 506 ; *Butlers v. Olds*, 11 Iowa, 1. And see next chapter.

<sup>3</sup> See *Ayer v. Tilden*, 15 Gray, 178 ; *Chase v. Dow*, 47 N. H. 405. See further, as to law of place, *Kavanaugh v. Day*, 10 R. I. 393 ; *Bowman v. Miller*, 25 Gratt. 331 ; *Lindsay v.*

*Hill*, 66 Me. 212 ; *Wayne Co. Savings Bank v. Low*, 81 N. Y. 566 ; 77 N. Y. 573 ; 33 Ark. 645. And see next chapter.

<sup>4</sup> *Martin v. Johnson*, 84 Ga. 481.

<sup>5</sup> *Simonton v. Vail*, 11 Wis. 90 ; *Matthias v. Cook*, 31 Ill. 83. And see, as to a substituted transaction after repeal of a usury act, *Kilgore v. Emmitt*, 33 Ohio St. 410 ; 25 Ohio St. 413 ; *Taylor v. Thomas*, 61 Ga. 472 ; *Bandel v. Isaac*, 13 Md. 202.

<sup>6</sup> See *Welch v. Wadsworth*, 30

The obligations of existing contracts as to interest are not to be impaired by State legislation.<sup>1</sup>

§ 290. **Summary of Chapter; Usufruct, Income, etc., of Personal Property.**—The leading results of our present brief investigation may be thus summed up. Concerning most species of property, there passes a sort of usufruct by the contract of hiring; the hirer acquiring that enjoyment of the thing with which the owner has parted for a time. Land is rented, ships are chartered, animals are taken for use; capital in general yields its income; and all this is by the operation of universal law. The value of the thing hired for any length of time bears a certain percentage to the value of the thing itself; and this percentage, which parties may generally be left free to regulate for themselves, fluctuates considerably; the risk of loss or deterioration of property which the owner runs, the scarcity of the thing, and the amount of enjoyment or profit which its use will probably bring, entering as elements into the computation.

So is it with money, the purchasing agent of worldly things and general representative of wealth; nor does it make any essential difference that when this species of property is loaned, the borrower is to replace in kind rather than restore the identical coin or currency. Money finds its own percentage of value, when placed out by parties on a contract of hiring; and the question is whether borrower and lender may safely be left free to determine the ratio according to their mutual contemporaneous convenience; whether in truth the capitalist who puts out money at interest has really more temptation and opportunity to oppress than he who lets ships and merchandise or the landlord of real estate. Where the law discountenances and forbids

Conn. 149; also *Starke v. Inman*, 1 Cart. 124; *Smith v. Glanton*, 39 Tex. 365. But see *Mitchell v. Doggett*, 1 Fla. 356, as to contracts void when made. Concerning constitutional provisions as affecting previous usury laws, see *Bandel v. Isaac*, 13 Md. 202.

<sup>1</sup> *Hubbard v. Callahan*, 42 Conn. 524; *Danville v. Pace*, 25 Gratt. 1.

Negotiable paper given after the repeal of the English usury laws, in renewal of paper previously given to secure a usurious loan, held in England valid. *Flight v. Reed*, 1 H. & C. 703.

As to the effect of a renewal of the usury laws after their repeal, see 63 Ga. 31. And see § 268.

the receiving of recompense for the hire of money altogether, we have usury, which is illegal, and no interest; where it fixes the limit of recompense, and prohibits taking more, we have interest up to that limit, which is legal, and usury beyond it, which is illegal; and finally, where it permits borrower and lender to determine the recompense for themselves, and set the percentage for themselves, we have interest, which is legal, and no usury. For, whatever the law of the land, men may as well attempt to drive money out of the world as to prevent its loan upon a recompense. That system of jurisprudence which allows the taking of recompense up to a certain point, and so divides interest from usury, receives, perhaps, the fullest assent of mankind; yet, if the latest legislative experiments on money lending prove successful, we of this generation may live to see "usury" stricken from the text-books, and "interest" left standing by itself.

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## CHAPTER XIII.

### CONFLICT OF LAWS RELATING TO PERSONAL PROPERTY.

§ 291. **Fundamental Rule as to Sovereignty.** — The sovereignty of every independent State is an admitted fact in all systems of jurisprudence; and a fundamental principle essential to this sovereignty is, that no municipal law, whatever be its nature or object, can of itself avail beyond the territorial limits of the State or government imposing it.<sup>1</sup> So zealous were the ancient nations to maintain their own legal usages to the exclusion of all outside or "barbarian" interference, that disputes under what we now denominate the "conflict of laws" could hardly have arisen in their day; and even the Roman Empire, which gave heed to the local customs of its conquered and dependent subjects, would not have permitted a law or custom to be set up against the imperial authority of its own code, or to defeat the proud

<sup>1</sup> 1 Burge Col. and For. Laws, 1-3; Story Confl. Laws, § 7.

birthright of a Roman citizen. During the period of the Middle Ages the sword was high arbiter between contending nations; and international jurisprudence found nothing like a solid foundation until the revival of trade had brought England and the countries of Continental Europe into a closer and more essential communion than ever before. But while a contiguity of boundaries and the similarity of their laws drew the modern Latin races, so called, closely together, as modern civilization advanced, England, isolated and independent, self-asserting, and proud of her common-law system, still disdained for a long time to acknowledge international obligations or allow foreign doctrines to impair the force of her own settled precedents.

§ 292. **Growth of International Jurisprudence; Works of Publicists, etc., on this Subject.** — While, therefore, Rodenburgh, the Voets, Boullenois, and other Continental publicists, were early in developing the legal philosophy of a conflict of laws, and discussed this important subject in a comprehensive and enlightened spirit, the international jurists of the Anglo-Saxon race failed to appear until the present century had well advanced. The growth of the American colonies and the annexation of Scotland had given an increased impulse, however, in Great Britain to the study of international conflicts; and in 1837 Mr. Burge issued his learned work on Colonial and Foreign Laws; Judge Story of our own country having just preceded him with a treatise which has since become the standard authority in English and American courts, on all questions involving the conflict of laws; and Chancellor Kent having earlier than either outlined the topic in his Commentaries. Westlake's treatise on Private International Law deserves honorable mention; and also the Commentaries of Sir Robert Phillimore, both of which works are English.<sup>1</sup> No other writers of prominence, English or American, occupied this field from the earliest period of the common law to the year 1872.

<sup>1</sup> Westlake's brief treatise, prepared with principal reference to English practice, has been lately rewritten and republished (1880). Of Phillimore's Commentaries, an extensive work of four volumes in its second edition, it should be said that International Law constitutes the

But a new volume is lately published on the same subject of the conflict of laws by an eminent text-writer of America, who tells us that four causes have recently operated to revolutionize the private law of nations: first, the adoption of naturalization treaties by leading nations; second, the abolition of slavery in the United States and Russia; third, the great comparative increase of personal wealth, as distinguished from real property; and fourth, the growing sense, on the part of England and the United States, of the duty of aiding in the punishment of crimes committed beyond the territorial jurisdiction.<sup>1</sup>

§ 293. **The Same Subject.** — It will be seen, then, that American jurists have done more thus far than those of England to bring into harmony and blend together the jarring systems of independent nations, by unfolding principles for universal recognition as the groundwork of an international law, upon which a lasting superstructure may be raised. They certainly have given the strongest impress, so far as taking the initiative is concerned. Indeed, the nature of our own American government, with its union of States, independent of one another for the most part, so far as concerns the ordinary transactions of life, and yet acknowledging a common federal chief supreme within a constitutional sphere of action, is such that questions of inter-State conflict must frequently come before the courts for adjudication, to say nothing of conflicts between federal and State authority, and the time-honored international disputes; so that the whole subject is and must remain one of far more vital im-

groundwork; the conflict of laws being only incidentally considered, and that with very little regard to American inter-State conflicts, and largely, moreover, by way of comment upon the standard treatises of Story and Wharton, in connection with those of Continental publicists.

The latest edition of Story's Conflict of Laws (in which the text and notes of the distinguished author are restored in their integrity as they stood at the date of his death) ap-

peared in 1883; it was prepared by Melville M. Bigelow, Esq.

<sup>1</sup> See Wharton Conf. Laws, c. 1; Story Conf. Laws, § 2; 1 Burge Col. and For. Laws, 3; 2 Kent Com. 107, 122, 462, &c. The second edition of Wharton's work was published in 1881. Wheaton, an American, has also been the standard Anglo-Saxon writer on the law of nations; Phillips, more, however, of late years, becoming a prominent authority on the same subject.



portance to us of the United States than to the subjects of Great Britain, where conflicts calling for judicial intervention are purely international, save so far as they may arise between the parent government and its colonial offspring.

And this consideration may furnish us with a reason why an extra-territorial jurisprudence, so to speak, should, on the whole, be more widely favored in American than the British courts; since here the conflict comes so frequently between jurisdictions not foreign to one another, but allied by blood, language, institutions, and political sentiment, — in one aspect distinct sovereignties, but in another a single people, — the people of the United States.<sup>1</sup>

§ 294. **Conflict of Laws as affecting Property; Laws as to Person and Property distinguished.** — Leaving then the conflicts of law, so far as they may affect the status or capacity of persons, let us consider those conflicts as they determine the rules of property, or rather, since our subject is confined within still narrower limits, as they may affect personal property or things movable, when distinguished from real estate or things immovable. Here we find some difficulty growing out of the various modes of classifying property adopted among different nations and under various systems of jurisprudence, and the disposition of one country to refer to the law of contracts what another would include under the law of things, — a difficulty which one must avoid in the best manner possible. It may be well to state at the outset that a law which has for its primary and chief object the *status* of persons, while its effect on things is secondary and inci-

<sup>1</sup> Mr. Wharton observes (1881) in the preface to the second edition of his work, that since the publication of the original edition (which, we may remark, shortly preceded the preparation of the first edition of the present volume) the literature on this topic has more than doubled, and that in the United States alone we have as many rulings bearing on international law since 1870 as were reported prior to that period. He observes further, that not only the

reports of our own courts and of the courts of England require an author's consideration, but the reports of the courts of the leading States of the Continent of Europe; adding, however, that as to Germany, France, Belgium and Italy, the jurists mould the courts, not the courts the jurists. In this preface the learned author enumerates the latest general works, many in number, European and American, which bear upon this subject.

dental, is to be deemed a personal law, — that is, relative to the person; but that a law which primarily and chiefly concerns things movable and immovable, its effect upon persons being only secondary and incidental, is a property law, — that is, a law relative to things. To the former head are usually referred, for instance, conflicting laws on the subject of citizenship, marriage, or the parental relation; to the latter, those which concern the general title to personal property, even though the domicile and citizenship of the owner may have an important bearing upon the determination of the issue in dispute.<sup>1</sup>

§ 295. **International Distinctions between Things Real and Personal.** — The great distinction between real and personal property which the common-law courts have maintained from the earliest known period, so far as legal conflicts are concerned, is that things real are governed by the *lex rei sitæ*, while things personal depend upon the law of the owner's domicile; in other words, that the laws of the place where a piece of real estate is situated determine exclusively the rights of parties, and the methods and requisite solemnities of transfer; but that the rights and modes of disposition as to any and all personal property are governed exclusively by the law rather which prevails at the domicile or fixed abode of the owner.<sup>2</sup>

The civilians generally concur in the foregoing rule, so far as concerns its application to real property or immovables; but by no means do either the civil or the common law writers admit the sweeping force of such a distinction as applied comprehensively to movables or personal property; so that while we have a simple and precise rule for the one species of property, we find at the present day a doubtful and fluctuating rule, subject to many exceptions, as concerns the other; and the tendency is now to bring both systems,

<sup>1</sup> See 1 Burge Col. and For. Laws, wick, 1 H. Bl. 690; Hoffman v. Carow, 22 Wend. 323; Birtwhistle v. Vardill, 5 B. & C. 451; 2 Cl. & Fin.

<sup>2</sup> 1 Burge, 28, 29; Story Conf. Laws, §§ 380, 424-428; Sill v. Wors-

so far as may be, under the one dominating influence of the *lex rei sitæ*; though in this direction the English and American courts have not gone so fast or so far as those of Continental Europe.<sup>1</sup>

§ 296. **Fluctuations of the Rule as concerns Personal Property.** — Let us note briefly some of the fluctuations of this important rule as concerns personal property; for the above distinction is to be taken as the starting point of any extended discussion of the conflict of laws. Mr. Justice Story asserted quite positively that this principle that things personal are governed by the owner's domicile had been constantly maintained with unbroken confidence and unanimity. And certainly the language of Lord Loughborough, Lord Tenterden, and other judges of a former generation, is strong enough to justify the statement.<sup>2</sup> To use the quaint old maxim, "Movables stick to a man's bones," — *Mobilia ossibus in hærent*; and when movables consisted chiefly of garments, jewels, household stuff, and cattle, the principle was easy enough of application. "Personal property," says Lord Loughborough, "has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person."<sup>3</sup> And there can be no doubt that such is the view that prevailed, not only in England and America, but likewise on the Continent of Europe, as to all kinds of personal property or movables until recently. And it mattered not whether these "movables" were ponderous or hard to carry away, so long as they were legally "movables" and not "immovables."<sup>4</sup>

But with the modern growth of incorporeal personal property, — property which, in fact, as we have shown, and pri-

<sup>1</sup> See P. Voet, Rodenburgh, and Boullenois, cited by 2 Burge, 751; Story Conf. Laws, § 376.

<sup>2</sup> Sill v. Worswick, and Birtwhistle v. Vardill, *supra*.

<sup>3</sup> Sill v. Worswick, *ib*.

<sup>4</sup> *Ib*. And see Wharton Conf. Laws, § 297; Story Conf. Laws, § 362, and cases cited; 3 Burge, 749-753; Blake v. Williams, 6 Pick. 286.

marily at least, has only a mental existence, — new reasons have developed for making the maxim *Mobilia ossibus inhaerent* unsatisfactory and comparatively futile. This, we apprehend, is in a considerable degree owing to the circumstance that our modern incorporeal property, so vast in value and volume, consists substantially of debts, or money rights simple, or else secured by lien, pledge, or mortgage; of a debt without tangible evidence of its existence; or, as in the case of certificates of stock, bills and notes, and negotiable instruments generally, of a debt accompanied by some writing which manifests its value, and passes from hand to hand as though it were the corporeal and tangible thing itself, instead of its representative; or perhaps of debts or money rights with some paper muniment of title such as a written assignment. Now debts or obligations and contracts are akin; and, as we approach the subject of obligations, we enter upon the *terra incognita* of legal conflicts, where various considerations are simultaneously presented and no one is all-controlling. In an obligation there are two parties: the obligee, with what is called an enlarged liberty; and the obligor, with his liberty restrained. And then, besides the question of domicile of either party, we have to consider the place where the obligation is entered into and the place where the same is to be performed. And wherever a transfer of personal property is to be accompanied with formalities greater than that of mere manual delivery, we find the rules applicable to contracts coming in further to confuse the principles which regulate transmission of property. A corporation does business and registers all stockholders at one place, while some individual who owns specific shares of its stock has his domicile at another. Furthermore, a strong objection which is brought against the test of an owner's domicile under any circumstances is, that it may be difficult to know at the outset who is the owner; so that if there be two litigants to the same property, having different domiciles, the suit fails at the start for inability to determine who is the owner and how it shall be tried. A similar objection might be urged in case pos-

session were taken as the test.<sup>1</sup> The rule of *lex rei sitæ* is, on the other hand, of comparatively simple and easy application.

§ 297. **Distinction between Real and Personal regards Property in its Legal Character.** — The fundamental distinction between real and personal property of which we spoke applies, of course, only to property considered in its legal character; and where a movable is annexed to the freehold so as to become incorporated with it, it follows the law of *situs*, because it then takes the incidents of immovable property.<sup>2</sup> And servitudes, easements, and charges on land generally, or such incorporeal rights as are strictly annexed to the realty, are governed by the *lex rei sitæ*; all these by the law of England being deemed to be real and not personal estate.<sup>3</sup> But it is to be remembered that the movables and immovables of the civil law do not precisely correspond to our legal divisions of real and personal, though the two grand divisions are quite similar in both civil and common law systems; and here the principle must be that every nation impresses upon property within its own territory such character as it shall choose; so that in any case, as Judge Story has observed, the question is not so much what ought or ought not from their nature to be considered movables, as what are deemed so by the law of the place where they are situated.<sup>4</sup>

Movables or things personal are subject to transfer and alienation as between persons living; also to succession *post mortem* or by virtue of some testamentary disposition, the title being thus transferred upon the owner's death. And a corollary of our leading doctrine would be that in either case the validity or invalidity of the transfer must depend upon the laws of the owner's domicile.<sup>5</sup>

§ 298. **Modern Dissatisfaction with the Test of Owner's Domicile.** — But the courts have not remained easy under such an

<sup>1</sup> See Savigny, Wächter, and other Continental writers, cited in Wharton Conf. Laws, §§ 298, 299.

<sup>2</sup> Story Conf. Laws, § 382, citing Pothier and others.

<sup>3</sup> Story Conf. § 447.

<sup>4</sup> Story Conf. § 447; Chapman v. Robertson, 6 Paige, 637. And see 3 Burge, 752.

<sup>5</sup> Story Conf. § 383; 3 Burge, 751; Moreton v. Milne, 6 Binn. 364; Cobb v. Buswell, 37 Vt. 337.

application of the broad doctrine of an owner's domicile in the case of personal property, and particularly as concerns transactions *inter vivos*. And here we find the exception stated, as to debts, that where some positive regulation exists in a State or nation concerning the mode of transfer, prescribing some particular mode by which alone the debt may be transferred, no legal title is acquired unless these forms are observed. And hence, property in the public funds and shares in joint-stock corporations, which the law prescribes shall be transferred only by observing certain formalities, must be transferred accordingly in order to be effectual; the law of the owner's domicile thus yielding to the law of local situation.<sup>1</sup> But though the positive or customary law of the place where the corporation is created governs the transfer of its shares, yet if there be no positive or customary law to the contrary a transfer good by the law of the place of the owner's domicile is valid everywhere.<sup>2</sup> And the equitable title would pass without the observance of such formalities, if the transfer be in good faith, and the laws of the country permit equitable transfers.<sup>3</sup> Another exception to the broad doctrine is that local prescription, when it attaches, cannot be unseated by the removal of the movable to another State.<sup>4</sup> Again, neither justice nor comity demands that the foreign law be recognized in a State to the extent of divesting titles of its own citizens fairly acquired; a principle asserted in New York so as to protect the *bona fide* holder without notice of a bond and mortgage, notwithstanding the New Jersey law made the title ineffectual, under the circumstances, as against New Jersey creditors.<sup>5</sup> The necessities of the case and the purposes of justice may interfere with the operation of the law of the owner's domicile. And the Supreme Court of the

<sup>1</sup> *Moreton v. Milne*, *supra*; *Robinson v. Bland*, 2 Burr. 1079; 3 Burge, 751; 2 Kent Com. 458, n.; *Dow v. Gould*, 31 Cal. 630.

<sup>2</sup> *Black v. Zacharie*, 3 How. 433. See *Hardaway v. Semmes*, 38 Ala. 657.

<sup>3</sup> *Ib.*; Ang. & Ames, 8th ed. § 586, & n.; 3 Burge, 751. But see Whart. Conf. § 364.

<sup>4</sup> See *Waters v. Barton*, 1 Cold. 43.

<sup>5</sup> *Hoyt v. Thompson*, 19 N. Y. 207.

United States, in a recent case, allowed an attachment of personal property to prevail against a mortgage which was valid by the law of the owner's domicile, but not by the law where the property happened to be situated, on the ground that the principle of comity yields when the laws and policy of the State where the property is located have prescribed a different rule of transfer from that of the State where the owner lives.<sup>1</sup>

§ 299. **The Subject concluded; whether *Lex Situs* shall prevail.** — It is thus perceived that the old rule of the owner's domicile applied to legal conflicts concerning personal property fails in these days to give full satisfaction. Mr. Wharton, indeed, after adducing strong arguments in favor of the law of local situation as the controlling principle both with reference to movables and immovables, states the present rule of international law to be that "movables, when not massed for the purposes of succession or marriage transfer, and when not in transit or following the owner's person, are governed by the *lex situs*, except so far as the parties interested may select some other law."<sup>2</sup> This is, so far as English and American precedents go, rather a rule of promise than of fulfilment, for our courts are far from accepting it, though the drift is apparently in that direction; and even the principle as thus stated indicates that the law of local situation is by no means so precise in its application to personal as to real property. Whatever exception may have been made in particular instances, the general principle is still usually stated, in the language of Judge Story, that personal property follows the law of the owner's domicile. The present uncertainty of the whole subject will appear more evident as one proceeds to examine the leading classes of personal property at the common law.

<sup>1</sup> *Green v. Van Buskirk*, 7 Wall. 139. See *Liverpool Marine Credit Co. v. Hunter*, L. R. 4 Eq. 62; *Mumford v. Canty*, 50 Ill. 370.

<sup>2</sup> Whart. Conf. Laws, § 311.

The reservation as stated in the second edition of this work (1881) is

as follows: "Though in some jurisdictions an exception may be made in cases where all the parties, being subject to a common domicile, are held to be bound by the laws of that domicile." Wharton, *ib.*

Considering, however, the limited scope of our present volume, we shall not pursue this subject into its details, but refer the reader to the latest editions of the standard text-books already referred to, where he may expect to find this interesting subject discussed at length.<sup>1</sup>

<sup>1</sup> Here we may add that a decision in the House of Lords in 1870 tends to regard the *lex rei sitæ* as to personal property with favor. The point decided, however, is that, when a thing is situated within the jurisdiction of the court, proceedings *in rem* give a title to it against all the world; and not otherwise. The rule is thus stated by Mr. Justice Blackburn: "Where a tribunal, no matter whether in England or a foreign country, has to determine between two parties and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the right of third parties; and if, in execution of the judgment of such a tribunal, process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. But when the tribunal has jurisdiction to determine, not merely on the rights of the parties, but on the disposition of the thing, and does, in the exercise of that jurisdiction, direct that the thing, and not merely the interest of any particular party in it, be sold, or transferred, the case is very different." *Castrique v. Imrie*, L. R. 4 H. L. (1870) 414. See Whart. Conf. §§ 828, 829; *Liverpool Marine Credit Co. v. Hunter* L. R. 3 Ch. 479; *Simpson v. Fogo*, 1 H. & M. 196.

The later American cases are by no means satisfactory as to the disposition of personal property. The old rule that the owner's domicile governs is still constantly asserted, though often by way of mere dictum. See Wharton Conf. § 353, 2d ed. and cases cited. See also the carefully expressed note of Professor Bigelow to Story Conf. 8th ed. (1883) § 383.

Clearly, however, the old fiction of law that personal property follows the domicile of the owner will be forced to yield, at the present day, whenever the purposes of justice require it; and, furthermore, we shall find that each independent State or nation seeks in a matter of doubtful controversy to apply any and all property under its control for the primary benefit of its own citizens, as against foreigners; though where all are citizens or all foreigners the rule becomes fluctuating and capricious. What the Supreme Court of the United States, as umpire between equal and contending States, would decide, is not conclusive as to what the courts of a sovereign nation might decide, were the controversy between itself and another sovereign nation. Self-interest will sway the policy of independent governments, so long as no common arbiter of peace is found to adjust their quarrels. We have, in fine, hardly progressed with the long-drawn controversy further than to enable the reader to observe, in the language of Mr. Justice Davis, in a recent very important case, that how far the transfer of personal property, lawful in the owner's domicile, will be respected in the courts of the country where the



property is located and a different rule prevails, is "a vexed question, on which learned courts have differed." See *Green v. Van Buskirk*, 7 Wall. 139; *Story Conf.* 8th ed. § 383, Bigelow's note. Writers of high repute would, indeed, gladly pilot us over to the *lex rei sitæ* as the true haven. But the courts still tarry. And it must be conceded that while the *rei sitæ* doctrine, if generally adopted, furnishes a test the simplest possible, and the easiest of application, that test is nevertheless certainly the most promotive of international selfishness. What is the probable result of controversies like that on which the English case of *Simpson v. Fogo* was decided, if not that vessels proceeding from port to port would be confiscated and sold by judicial process, and resold in each new country, until the temporary owner could find no use for his property save in allowing it to rot in the dock-yard at home?

Those who contend for the doctrine of *lex rei sitæ* own that it is not and ought not to be applied with the same force to movables as to immovable property. They admit that, in a number of instances where goods and chattels are concerned, the exception in favor of the owner's domicile or the place of contract must still prevail. Thus, there is the case of goods in transit; and in this connection a late Continental writer calls attention to the fact that the doctrine of the *lex rei sitæ* with reference to movables rests on the assumption of continuousness of location in a certain territory. See *Whart. Conf.* §§ 298, 353, 354, citing *Bar.*

Mr. Bigelow (note to *Story Conf.* 8th ed. § 383), after a careful review of the latest cases down to 1883, observes that while the progress towards

the *lex rei sitæ* in questions of movables has been firm in the Supreme Court of the United States, the courts have not all reached this position, and the law is still in a state of transition unless the authority of *Green v. Van Buskirk* is final. See *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Paine v. Lester*, 44 Conn. 196; *Pritchard v. Norton*, 106 U. S. 124.

Since the above note was written (1883) the Supreme Court of the United States, in reaffirmance of *Green v. Van Buskirk supra*, has decided that personal property, subject to a lien claim under the statute of one State is, when sent into another State and received by a broker who has no knowledge of such lien, subordinate to the laws of the latter State where the property is now situated. *Walworth v. Harris*, 129 U. S. 355. Cf. 147 U. S. 476. As to stock, the rights of the stockholder or beneficiary, whatever his domicile, must depend upon the law of the State which created the company, and in reference to whose laws the contract of subscriber was made. *Glenn v. Liggett*, 135 U. S. 533. In corporation cases of this sort, the law of contract as entered into, or of the place where the contract was to be performed, becomes an ingredient of the comity and increases the confusion, where one wishes to regard the personal property as such. See 128 U. S. 195. The latest English inclination appears to be, in questions of a purchaser's title or ownership generally of a bill or note or of a certificate of stock, to prefer applying English to foreign law. *Williams v. Colonial Bank*, 15 App. Cas. 267; *Alcock v. Smith* [1892] 1 Ch. 233. Cf. [1892] 1 Ch. 219, 226, which (in a case of debentures) explains *Simpson v. Fogo, supra*.

## PART III.

### LEADING CLASSES OF PERSONAL PROPERTY.

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#### CHAPTER I.

##### SHIPS AND VESSELS.

§ 800. **Chattels Corporeal first to be considered; Ships or Vessels and Money.** — Personal things of a corporeal nature, for the most part, such as corn, jewels, and merchandise, need not claim special consideration in this treatise. Of animals we have spoken in another connection.<sup>1</sup> But there are two classes of corporeal chattels which should here be noticed at some length. One of these consists of ships or vessels, the other of money.

§ 801. **Ships or Vessels; History of the Law of Shipping.** — Ships, as the reader has already seen, are chattels, though made to plough the waters and rarely taken for transportation from place to place like land movables. And such peculiar solemnities attending their transfer are to be found under the registry laws that some have even inclined to the belief that they are not chattels at all; it being undoubtedly true that the law of shipping is older than the law of freeholds and chattels; older than Bracton and Fleta; older in some respects than the civil law of Rome itself, as prevalent in the times of Justinian. For the famous imperial Digest pays tribute to the maritime laws of Rhodes, where commerce flourished at least a thousand years before the Chris-

<sup>1</sup> *Supra*, §§ 48-51. See also Volume II. as to Estrays, &c.

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tian era. Yet the Roman civil law, the Consolato del Mare, the Laws of Oleron, the Laws of Wisbuy, Le Guidon, the Marine Ordonnance of Louis XIV., the Commentaries of Valin, and the treatises of distinguished writers of Continental Europe, among whom Pothier is conspicuous, shaped and directed the growth of our commercial system. The usage of merchants, or rather commercial usage thus borrowed from abroad, reinforced the scanty store of old common-law precedents, and in time enabled our later jurists, such as Mansfield of England and Story of the United States, to announce those legal principles which are now recognized as constituting the Anglo-Saxon law of shipping, and which must continue to develop with the rapid growth and increasing wants of modern commerce.<sup>1</sup>

§ 302. **The Ship a Peculiar Chattel.**— We say, then, that a ship is a chattel; or, better still, that it is personal property, a movable and not real property. But it is a very peculiar kind of property, in law and in fact; and so it has been treated from the time when insignificant craft carried merchandise between neighboring ports on the Mediterranean Sea, to this day, when we see large vessels built, equipped, and freighted to circumnavigate the globe.<sup>2</sup> We use here the word “ship,” too, in its general sense, as denoting any vessel employed in navigation, whether a ship of war or a merchant ship, whether a steamship or a sailing vessel, whether a brig, a schooner, a sloop, or a three-masted vessel.<sup>3</sup> The ship’s element is not the land, nor can vessels of the larger sort attend, literally, the person of the owner; but when we transport a small boat over land the chattel character of all such property becomes obvious.

§ 303. **Division of the Present Chapter.**— Our brief examination of the law relating to ships, in the present chapter, will lead us to consider (1) the title to a ship and modes of transfer; (2) the persons employed in and about a ship; (3) the

<sup>1</sup> See 1 Pars. Shipping, c. 1; Abb. Shipping, preface. Maritime law is only so far operative in any country as it is adopted by the laws and usages

of that country. The Scotland, 106 U. S. 24.

<sup>2</sup> See Jacobsen’s Sea Laws, 21; 1 Pars. Shipping, c. 2.

<sup>3</sup> See Bouv. Dict. “Ship.”

manner of the ship's employment; (4) marine torts, and perils peculiar to navigation; and (5) the jurisdiction of courts of admiralty.

§ 304. **Title to a Ship, and Modes of Transfer.** — *First*, concerning the title to a ship and modes of transfer. Of part-owners we have spoken elsewhere;<sup>1</sup> and it remains to notice how one or more persons may acquire their interests in a ship. This is usually by building or purchase; while at the same time, by the death of an owner, his interest will devolve upon his executors or administrators, as in the case of other personal chattels. The common law makes a conveyance necessary to the sale of real estate, while mere delivery without any writing suffices to pass any chattel. And hence a ship, by some method of symbolical delivery, might be transferred from one owner to another, though no formal written instrument accompanied the act of delivery. Such, at least, is the logic of the rule; but government long ago interposed with its registration and navigation policy, and so universal has become the custom of giving bills of sale of a peculiar sort, that no one in our day would care to risk his title to a vessel of considerable size and value on a mere parol transfer and delivery.<sup>2</sup>

§ 305. **The Same Subject; Registration, Bill of Sale, etc.** — The registration and navigation acts are said to have originated in their present form some two and a half centuries ago, through the desire of Spain to preserve the commerce of her American colonies; in England the policy dates from the time of Charles II.; and in this country a national registration system was established soon after the adoption of our present constitution, with the act of December 31, 1792, modified since by various statutes, among which the act of 1850 is conspicuous.<sup>3</sup> Certain privileges attach to a ship which has been duly registered, and thereby acquires a national character; and in England an exact and rigid system of registration

<sup>1</sup> *Supra*, §§ 205-214.

<sup>2</sup> See *Abb. Shipping*, 23; *The Sisters*, 5 *Rob. Ad.* 155; 1 *Pars. Shipping*, 55-58.

<sup>3</sup> *Reeves, Law of Shipping*, 35; 1 *Pars. Shipping*, 25-27; *Abb. Shipping*, part 1, c. 2.

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was continued in force until the middle of this century, so as to secure a rich monopoly of the carrying trade to vessels of that country; the requirement being that every alteration in the property of a ship or vessel should be indorsed on the certificate of registry before witnesses, and should itself be registered, while every bill of sale thereof was made "null and void" unless it contained a recital of the registry certificate at length.<sup>1</sup> The United States statutes, on the other hand, did not declare any informal transfer null and void, at least down to a recent period; they simply denied to ships transferred without the formality of a written instrument, which recited at length the certificate of registry, the privileges of ships of the United States.<sup>2</sup> But in 1850—or at about the same time that Great Britain relaxed her old policy so as to favor somewhat foreign-built vessels and "free trade"—the registry system of the United States tightened its grasp upon American vessels by declaring that no bill of sale, mortgage, hypothecation, or conveyance of a vessel of the United States, in whole or in part, should be valid against any other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice, unless the instrument was recorded at the office of the collector of customs.<sup>3</sup> This

<sup>1</sup> See 1 Pars. 50; *Weston v. Penman*, 1 Mas. 317; 2 De G. F. & J. 502. The English act of 1854 (17 Vict. c. 5) admitted foreign ships to the coasting trade. In 1854, too (17 & 18 Vict. cs. 104, 120), a new statute amended and consolidated the previous laws relating to merchant shipping. Various other enactments from 1854 to 1880, relative to this subject, are to be found in Vol. II., Maude and Pollock Shipping, 4th ed. (1881).

The transfer of a British ship is now governed by the express provisions of the Merchant Shipping Acts (1854 and acts subsequent), which make a clear distinction between the legal estate and mere beneficial interests therein. *Chasteauneuf v. Caperyon*, 7 App. Cas. 127. See Act 12 & 13 Vict. c. 29 (1850). A written

agreement for sale need not be registered under the English act of 1854; nor need the special description of the ship be inserted therein. *Bathany v. Bouch*, 29 W. R. 665. New provisions in favor of equitable mortgages not registered are found in subsequent English acts. 17 & 18 Vict. c. 104; 25 & 26 Vict. c. 63.

<sup>2</sup> 1 Pars. 50; Abb. Shipping, 58-96; *Hozey v. Buchanan*, 16 Pet. 215.

<sup>3</sup> 9 U. S. Stats. 440, c. 27; *Brightly* Fed. Dig. 780. The constitutionality of this act has been sometimes doubted. See 1 Pars. Shipping, 26, 53, 60. For the latest phraseology of the United States registry acts, see U. S. Rev. Stats. §§ 4131-4196. *Barges, &c.*, are not subject to registration in certain cases. 21 Stat. Large, 44 (Act June 30, 1879). A

accords with the long-settled registry policy of our several States in sales and mortgages of real estate, and whenever, in fact, written instruments of title must be relied upon, rather than a visible possession, to establish ownership or security.

A bill of sale becomes, then, customary, if not indispensable, for transferring the ship absolutely from one owner to another. In England the first bill of sale, by which the property passes from the builder to the first purchaser or owner, is distinguished from bills making subsequent transfers as the "grand bill of sale." We have no such distinction in this country.<sup>1</sup> In questions of registry and of actual and constructive notice, the same principles probably would apply in the case of a bill of sale or mortgage of a vessel, as under the long-established registry acts of our States relating to real estate; while it may be readily supposed that the United States statute of 1850 controls the State statutes relating to mortgages of personal property, so far as to make compliance with its own formalities of registry essential.<sup>2</sup> Hence, the recording of a mortgage in the office of the collector of the home port of a vessel will suffice to give this mortgage priority over subsequent purchasers or mortgagees, irrespective of formalities which may be required by State laws.<sup>3</sup>

mortgage of a vessel of the United States is not, as against the parties and such persons as have actual notice thereof, rendered invalid by the failure to record it under U. S. Rev. St. §§ 4192, 4193. *Moore v. Simonds*, 100 U. S. Supr. 145. For late decisions on various points connected with our registry acts, see 5 Sawyer C. C. 83; 6 Sawyer C. C. 106; 8 Ben. 109, 429. Following the usual rule of chattel mortgages, the mortgagee's claim upon the vessel may be subordinated to liens *in rem* necessarily created for repairs and supplies. *Rumbell, The*, 148 U. S. 1. See c. 4, *post*.

Registration is not necessary to make the sale of a steamboat in Ten-

nessee valid. 7 Lea, 294. License to engage in the coasting trade is not to be construed as impairing the State powers. 7 Sawyer C. C. 127. By act July 5, 1884, c. 221, a bureau of navigation is established under the immediate charge of a commissioner.

<sup>1</sup> *Abb. Shipping*, 3; *Gordon v. East India Co.*, 7 T. R. 228, 234; 3 Kent Com. 133; 1 Pars. Shipping, 60; *Wheeler v. Sumner*, 4 Mas. 183.

<sup>2</sup> 1 Pars. *ib.* and cases cited; *Horton v. Davis*, 26 N. Y. 495.

<sup>3</sup> *White's Bank v. Smith*, 7 Wall. 646. A chattel mortgage on a vessel, if recorded pursuant to the United States registry acts, is valid, although the State law of registry be not complied with. 16 Hun, 512.

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Nor can the mortgage of a vessel, duly recorded, be defeated by a subsequent attachment under a State law.<sup>1</sup> But it is held that the statute of 1850 applies only to vessels which are registered, licensed, or enrolled, and that a mortgage of vessels not answering to this description follows the registry acts of the State, and need not be recorded at the custom-house.<sup>2</sup> Nor does the act itself apply to charter-parties; nor to the lien of material-men for supplies.<sup>3</sup>

§ 306. *The Same Subject; Policy of Registration, License, and Enrolment.* — As to registration, license, and enrolment, it may be said that the policy of the United States, following the example of Great Britain, is both to confer peculiar privileges upon vessels bearing the national flag, and to exercise likewise a judicious control of the merchant service. Various classes of vessels are enumerated by the act of 1792 and subsequent statutes as entitled to registry, including those built within or without the United States, which belong to citizens thereof; and likewise any vessel that has been enrolled, on the enrolment and license being given up for the purpose of obtaining the registry. Before the certificate of registry is given, the vessel must be surveyed by a customs officer, and security given for a proper use of the certificate. The name of a registered vessel cannot be changed except in special cases. Vessels enrolled and licensed, or licensed only, if under twenty tons, are entitled to the privileges of vessels employed in the coasting trade or fisheries; and the same general qualifications are required as in case of registered vessels. Such being the system of registration, license, and enrolment, all other vessels are subjected by statute to large tonnage duties, in addition to the tax on imported articles. These must be paid at the time of making entry, and before permit can be granted for unlading the goods. Discriminating tonnage duties are not exacted from the vessels of such nations as abolish similar duties in favor of the United States; and the rate

<sup>1</sup> *Aldrich v. Ætna Co.*, 8 Wall. 491.

<sup>2</sup> 1 Pars. Shipping, 62; *Mott v.*

<sup>3</sup> *Veazie v. Somerby*, 5 Allen, 280. *Ruckman*, 3 Bl. C. C. 71.

of the tax has varied since the adoption of the Constitution, being considerably increased during the late rebellion.<sup>1</sup>

The certificate of registration of a vessel and proof as to the flag carried by her are competent and convenient evidence, to whatever distant point the vessel may go, for showing her nationality and ownership.<sup>2</sup>

§ 307. **The Same Subject; Sale and Transfer of Title.** — When a ship is built, the builder is deemed the first owner, and to the first purchaser he transfers by a bill of sale, — or, as the English writers state it, “the grand bill of sale,” — taking care to give his certificate to the owner, that the formalities of registration may be complied with.<sup>3</sup> One might suppose that parties would sometimes wish to contract with a person to build the ship for them, he doing the work and they being owners from the outset; but such is not the practice, though a conveyance of the keel after it has been laid vests the property thereof in the vendee, and draws after it all subsequent additions.<sup>4</sup> There is much confusion in the authorities concerning the legal title to the vessel and its transfer, where the purchase-money is paid in instalments during the progress of the work; but the question would seem to be one of intent to be gathered from all the circumstances.<sup>4</sup> Whether paid for in this manner or not, and not-

<sup>1</sup> See Brightly U. S. Dig. “Ships and Shipping;” 1 Pars. Shipping, 25-49, and cases cited.

“The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade, or home traffic, and to enable such vessel to procure a coasting license.” Mr. Justice Miller in *Mohawk*, The, 3 Wall. 566, 571. A vessel owned by a citizen of the United States, and not registered or enrolled as the statute provides, is American property, with all the general incidents of any property of an American; although

it has been stated that such vessels are “of no more value, as American vessels, than the wood and iron out of which they are constructed.” *White’s Bank v. Smith*, 7 Wall. 655, 656. The statute provisions for enrolment are similar to those for registering, but not identical with them.

<sup>2</sup> *St. Clair v. United States*, 164 U. S. 134.

<sup>3</sup> 1 Pars. Shipping, 63-67; Abb. Shipping, 3-7.

<sup>4</sup> *Ib.*; *Woods v. Russell*, 5 B. & Ald. 942; *Moody v. Brown*, 34 Me. 107; *Andrews v. Durant*, 1 Kern. 36; *Wood v. Bell*, 6 Ell. & B. 355; *Haney v. Schooner Rosabelle*, 20 Wis. 247; *Scudder v. Calais Steamboat Co.*, 1 Cliff. 370; *Sandford v. Wiggins Ferry Co.*, 27 Ind. 522; *Butterworth v.*



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withstanding the property in the ship may have passed before it was completed, the builder has a common-law lien, and may hold possession until he has finished it and earned his full price.<sup>1</sup> Again, the ship is frequently sold by the master in a case of imminent and imperious necessity; by which is meant something more than mere expediency and convenience; for, to justify a sale of this sort, there must have been circumstances strong enough to control the duty of sailing the ship home again, and such as would leave a prudent man no option but to sell at once.<sup>2</sup> Wherever the master may be, he ought to get instructions from the owners before concluding to sell, if he can; and with the increased facilities now afforded by the extension of the electric telegraph, this becomes comparatively easy; yet if the peril be such as not to admit of this delay, he may act promptly for the good of all concerned.<sup>3</sup> The ship being lawfully and justifiably sold, the purchaser will take an absolute title divested of all liens.<sup>4</sup> So, too, courts of admiralty assert an authority which they seldom, if ever, exercise, that of ordering the sale of a vessel because

McKinly, 11 Humph. 206. The doctrine in *Woods v. Russell*, *supra*, is understood to be that the title to the unfinished ship vests usually in the builder as the work progresses. Bigelow, C. J., in *Williams v. Jackman*, 16 Gray, 514, observes, however, that under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered or ready to be delivered, in the absence of stipulations, express or implied, to the contrary. And see *Andrews v. Durant*, 11 N. Y. 35; *Elliott v. Edwards*, 35 N. J. L. 265; 36 ib. 449. Very recently the Supreme Court of the United States expressed its approval of the principle that there is no arbitrary rule in such case, but that in each transaction the circumstances are decisive of the question. *Clarkson v. Stevens*, 106 U. S. 505, *per* Mr. Justice Matthews. See further Vol. II., §§ 266-268.

<sup>1</sup> *Woods v. Russell*, 5 B. & Ald. 942. Contracts for building vessels, or for labor done or materials furnished in their construction, are not maritime contracts. *The Tuttle v. Buck*, 23 Ohio St. 565; *Thorsen v. Martin*, 26 Wis. 488; *Edwards v. Elliott*, 36 N. J. 449; s. c. 21 Wall. 532; *Foster v. Busted*, 100 Mass. 409; *Sheppard v. Steele*, 43 N. Y. 52. Liens are enforceable in a State court accordingly. *Ib.*; and see *Dorr v. Waldron*, 62 Ill. 21.

<sup>2</sup> 1 Pars. Shipping, 68-74; Abb. Shipping, 17; *Somes v. Sugrue*, 4 C. & P. 276; *New England Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387; *The Amelie*, 6 Wall. 18; *Peirce v. Ocean Ins. Co.*, 18 Pick. 83; *Butler v. Murray*, 30 N. Y. 88.

<sup>3</sup> *Pike v. Balch*, 38 Me. 302; *New England Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387.

<sup>4</sup> *The Amelie*, 6 Wall. 18. But as to other special liens of necessity, cf. *Rumbell, The*, 148 U. S. 1.

unseaworthy or unfit for service; and they condemn ships as prize or for forfeiture as contraband, or for smuggling, or to pay salvage, and to satisfy bottomry bonds and maritime liens generally; the decree under which the sale is made being, apparently, good and binding the world over, unless vitiated by fraud.<sup>1</sup> But the admiralty court must be a regular one in order that foreign nations recognize its jurisdiction.<sup>2</sup>

§ 308. **The Same Subject; what Appurtenances pass under Instruments of Transfer.** — What are the appurtenances of a ship, how much passes by the word “ship,” or the phrase “ship and its appurtenances” or “apparel” or “furniture,” in instruments of transfer, is not clearly established by the authorities. Usage aids in determining the question, — as for instance, under a policy of insurance; but mere connection with the ship is not sufficient unless the thing be appropriate for use with the ship; and, as in the case of fixtures, there may be a constructive annexation to the ship without an actual attachment, the use or destination being mainly regarded. Cargoes do not pass as appurtenances; nor would ballast usually; nor a chronometer in all cases; and as to the ship’s boat, there is some uncertainty; but sails, rigging, and rudder are among a ship’s appurtenances; and, in general, whatever is on board the ship for the objects of the voyage and adventure on which it is engaged.<sup>3</sup> A ship is always the same, though all the materials which at first gave it existence had successively disappeared; and if taken to pieces for the purpose of reconstruction, the ship preserves its identity; though not, it is said, if taken to pieces with no such intent and afterwards reconstructed in part.<sup>4</sup>

§ 309. **The Same Subject; taking Possession under a Transfer; Rule of Caveat Emptor, etc.** — As a ship may be sold at one port while lying at another, or upon the high seas, it

<sup>1</sup> Reid v. Darby, 10 East, 143; The Tilton, 5 Mas. 465; 1 Pars. Shipping, 74–77; Abb. Shipping, 19 *et seq.*

<sup>2</sup> *Ib.*; The Flad Oyen, 1 Rob. Adm. 135. See Grant v. McLachlin, 4 Johns. 34.

<sup>3</sup> See 1 Pars. 78, *n.*, and cases cited; Abb. Shipping, 5, 6; Bouv. Dict. “Ships.” So, too, under a mortgage, necessary articles subsequently substituted. 25 Q. B. D. 328.

<sup>4</sup> Molloy, book 2, c. 1, § 6; 1 Pars. Shipping, 82.

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is evident that immediate delivery of possession is often impossible, while at all times possession must be rather symbolical than actual. So far does the rule that the sale of a chattel without accompanying possession is a badge of fraud become inapplicable to property of this description that we find *bond fide* transfers of a ship on good consideration sufficient to vest a title in the purchaser, provided only that he takes possession as soon as may be. The period usually recognized in England and the United States, within which the vendee or mortgagee should take possession, is a reasonable time after the ship's arrival in port; though further precautions may be desirable, for the purpose of compliance with the registry statutes, and to give due notice to the public.<sup>1</sup> The transfer, then, unaccompanied by possession, does not give an inchoate right, but a complete right, subject, however, to be defeated by unreasonable delay in taking possession.<sup>2</sup> The usual rules as to evidence, warranty, and agency apply to the sale of ships as to the sale of personal property generally; but as the mutual stipulations appear in a written instrument, there is comparatively little latitude for discussion as to what might have been said or intended when the parties made their bargain.<sup>3</sup>

There is an implied warranty that the ship shall be fit for the purpose for which it was built.<sup>4</sup> And the much criticised doctrine of *caveat emptor* likewise prevails, subject to the usual qualification that the seller shall not actively deceive the purchaser as to defects in the property.<sup>5</sup>

§ 310. **Concerning the Persons employed in and about a Ship.** — *Second*, concerning the persons employed in and about a ship. These are, chiefly (leaving out of view the ship's husband or managing owner, of whom we have spoken elsewhere<sup>6</sup>), the master of the ship and the seamen.

<sup>1</sup> *Veazie v. Somerby*, 5 Allen, 280; & G. 868; *Cunningham v. Hall*, 4 1 Pars. Shipping, 82 *et seq.*; Bright. Allen, 268.  
Fed. Dig. 780; Abb. Shipping, 28.

<sup>2</sup> *Ib.*

<sup>3</sup> See 1 Pars. Shipping, 86-89; & Baglehole v. Walters, 3 Campb. 154; Taylor v. Bullen, 5 Ex. 779; Dyer v. Lewis, 7 Mass. 284. See Vol. II., as to Sales.

<sup>4</sup> See *Shepherd v. Pybus*, 3 Man. & § 214.

§ 311. **The Same Subject; Master's Rights and Duties.** — The master (sometimes known as the captain or the ship's husband) is the person entrusted with the care and management of the ship on its usual employment. His position is one of peculiar responsibility; and great care is necessary in selecting a man honest and competent for encountering the perils of the deep and conducting the ship and cargo safely to port; besides supervising the loading and unloading of the goods. The ancient sea-laws and ordinances seem to show that the master was almost invariably a part-owner in those days; but the rule is now otherwise, the master having ordinarily no property in the ship. And while in some countries a previous examination is required, in order to test his nautical skill, the master of a merchant vessel in England and the United States may be selected by the owners at their discretion.<sup>1</sup> The rights and duties of the master on ordinary occasions are regulated for the most part by custom. As between himself and the owners he is bound to exercise such skill and diligence as the duties of his position demand. As to all with whom he deals, reasonable care, prudence, and fidelity are expected of him; and he may be sued if mischief results from the want of them, whether the error be that of the head or the heart only.<sup>2</sup> Usage gives him a certain percentage on the freight, over and above his wages, which is known as *primage*, and some privilege in carrying goods for himself or others.<sup>3</sup> His wages are due him even though the ship be captured or wrecked.

As to his powers, they are those of an agent with a scope adequate for the purpose of his momentous employment; and when abroad, without ready opportunity of consulting the owners, his authority to act on their behalf in the exercise of discretion becomes greatly enlarged. It is said that the master is "the confidential servant or agent" of the

<sup>1</sup> Abb. Shipping, 118, 119; 2 Pars. Shipping, 3 *et seq.*

<sup>2</sup> Bright. Fed. Dig. "Shipping," 786; *Purviance v. Angus*, 1 Dall.

184. See Perkins' *n.*, correcting Abb. Shipping, 119.

<sup>3</sup> 2 Pars. Shipping, 4, 5; *Pawson v. Donnell*, 1 Gill & J. 1; *Scott v. Miller*, 5 Scott, 18, 15.

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owners at large.<sup>1</sup> He is not ordinarily presumed to have a right in the home port to make a charter-party, nor to order repairs, nor to raise money on bottomry ; but all these things he may do abroad : for the rule is that he may bind by lawful contracts which relate to the usual employment of the ship and are within the reasonable scope of his ordinary powers.<sup>2</sup> By the general rule of the maritime law he may hire the seamen, and the contract he makes with them will bind the owners.<sup>3</sup> The master is, in most cases where he makes a contract for his ship, largely responsible. And if goods on board are injured by his unskilfulness or misconduct, or if they are stolen or lost so as to make the owners responsible, the master would generally be responsible likewise. The owners are not only liable to third persons for the contract of the master, but also for his wrongful acts when done within the scope of his employment. But for his wilful and malicious acts beyond such a scope they are not liable ; as where he wantonly runs another vessel down, or without the knowledge and authority of the owners turns pirate ; though the limit to the owners' liability is not easily defined, especially where they have incurred the risks and responsibilities of common carriers.<sup>4</sup> Where the owners are obliged to pay damages for the master's wrong-doings, they may sue him in their turn ; and he is responsible to them if

<sup>1</sup> See Abb. Shipping, 124.

<sup>2</sup> *Provost v. Patchin*, 5 Seld. 235 ; *Jordan v. Young*, 37 Me. 276 ; *The Tribune*, 3 Sumner, 144 ; 2 Pars. Shipping, 8-10 ; Abb. Shipping, 126, 127.

<sup>3</sup> 2 Pars. Shipping, 11. Custom may, if general and well known, authorize the master to insure a vessel for the benefit of the owners without their express direction. *Adams v. Pittsburgh Ins. Co.*, 95 Penn. St. 348. But as to a master's implied power to bind the owners by a penal bond, see *Mitchell v. Chambers*, 43 Mich. 150 ; *Gager v. Babcock*, 48 N. Y. 154. A master's contract for fitting out, victualling, and repairing, and which

binds him personally, binds the owner also, unless it is clearly shown that credit was given to one exclusive of the other. *Williams v. Windley*, 86 N. C. 107. And see *supra*, §§ 206, 214.

<sup>4</sup> Abb. Shipping, 131, *Perkins' n.* ; *Purviance v. Angus*, 1 Dall. 180 ; *Bright. Fed. Dig.* 785, 786 ; 2 Pars. Shipping, 26-31 ; *The Druid*, 1 W. Rob. 391. Owners of a privateer are held liable for the torts of the master. See as to "common carriage" liability, *Schoul. Bailm.* §§ 476, 573. For exemption of owners from liability to a seaman for the master's acts on the ground of "common employment," see *Hedley v. Steamship Co.* [1894] App. C. 222.

he violates to their injury any material instructions under which he sailed.<sup>1</sup>

The relation of the master to the cargo is somewhat different from that which he bears to the ship; and this relation changes during the period which elapses from the date of lading to that of unlading. He is generally bound to receive the cargo and stow it properly. But while on the voyage he is regarded in respect to the cargo as master of the ship only. When at length the goods have reached their destination, he drops the character of master, and deals with the cargo, in unlading it, as a supercargo or consignee. Sometimes, however, the functions of master and supercargo or consignee are combined at one and the same time.<sup>2</sup>

§ 312. **The Same Subject; Master's Powers in an Emergency.**

— But the master of a ship has an enlarged authority in cases of emergency, which is usually denominated his “power from necessity.” This it is that justifies him in ordering repairs and supplies in a foreign port, borrowing money on the security of the ship, or even selling the ship as a last resort; by any or all of which acts the owners become bound as much as though the transaction were their own in person. But the necessity must be real and positive, in order that the master may assume such vast authority over property belonging to his employers; and the necessity which justified him in ordering a sale must be far more stringent than that which authorizes the borrowing on the ship's security; while that which authorizes the borrowing is usually considered more urgent than that which makes the owners responsible for repairs.<sup>3</sup> “Whatever is fit and proper for the service on which a vessel is engaged,” said Chief Justice Abbott, “whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term ‘necessary,’ as applied to those repairs done or

<sup>1</sup> *Ib.*; *Brown v. Smith*, 12 Cush. 366.

<sup>2</sup> 2 *Para. Shipping*, 20-22; *Cook Com. Ins. Co.*, 11 Johns. 40; *Day v.*

*Noble*, 2 Pick. 615. See *Mephams v. Biessel*, 9 Wall. 370.

<sup>3</sup> *Abb. Shipping*, 150, 160; 2 *Para. Shipping*, 13-18.

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things provided for the ship by order of the master, for which the owners are liable."<sup>1</sup>

Hence, to enforce a lien for repairs and supplies, whether express or implied, the rule is well established in this country that the creditor must prove that the repairs or supplies were necessary, or believed, upon due inquiry and credible representation, to be necessary in the particular foreign port. And it is further ruled that where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive, in the absence of evidence to the contrary, of necessity for credit. The ordering by the master of supplies or repairs upon the ship's credit is sufficient proof of such necessity to support an implied hypothecation in favor of the material-man, or of the ordinary lender of money, acting in good faith, to meet the wants of the ship. And to support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required; and, if the fact of necessity be left unproved, evidence is also required of due inquiry, and of reasonable grounds of belief that the necessity was real and exigent.<sup>2</sup> Such, in substance, is the latest exposition of the law by the Supreme Court of the United States, which is rather more liberal to the lender of money upon credit than formerly.<sup>3</sup> While, however, in this country, the master may borrow money not only for the purpose of buying necessities for the ship, but to pay for necessities already furnished, the English cases seem to discountenance borrowing after the work is done to pay the debts incurred.<sup>4</sup>

§ 813. **The Same Subject.** — Even over the cargo the master acquires extraordinary power under extraordinary circumstances. Where he has neither money nor credit, and cannot communicate with his owners, he may sell part of his cargo, if he cannot make necessary repairs and prosecute his

<sup>1</sup> Webster v. Seekamp, 4 B. & Ald. 352.

<sup>2</sup> The Grapeshot, 9 Wall. 129; The Lulu, 10 Wall. 192; modifying Pratt v. Reed, 19 How. 359.

<sup>3</sup> *Ib.* See also Bliss v. Ropes, 9 Allen, 341.

<sup>4</sup> 2 Pars. Shipping, 16; Brightly Fed. Dig. 786, 787; The Grapeshot, 9 Wall. 129; Beldon v. Campbell, 6 Ex. 886; Robinson v. Lyall, 7 Price, 592.

voyage except by so doing.<sup>1</sup> He may sell the whole cargo, if he can neither take it on nor place it on another ship, if made up of perishable goods whose value would be greatly diminished or utterly destroyed before instructions could be obtained from the owner.<sup>2</sup> Yet whatever he does with the cargo for the purpose of raising funds for the voyage is upon the supposition that other means of obtaining necessary supplies, such as drawing bills on the owners, hypothecating the ship, and using the owners' credit, have been exhausted. And we need hardly add that the case must be one of actual and urgent necessity, and of prudent conduct under the stress of such necessity.<sup>3</sup> For the cargo, unless, indeed, it belongs to the owners, is one thing, and the ship quite another, so far as the master's authority is concerned.<sup>4</sup> Yet he has duties connected therewith, even where no great exigency has arisen; for he should stow away properly, ventilate, unpack and dry, and otherwise seek to preserve goods on board the vessel peculiarly subject to damage, in the exercise of good judgment; though he need neither repair, nor delay his voyage for the sake of his cargo.<sup>5</sup> In case of capture the master should do all in his power, consistent with honor and a reasonable diligence, to get the cargo restored.<sup>6</sup> And in the emergency of stranding and other sea perils, we shall see presently that both ship and cargo contribute for acts of the master done for the common benefit of the property exposed to danger. All such special emergencies extending the scope of the master's powers over ship or cargo presuppose that he is not within communicating distance as to owners, and must act upon his own responsibility.<sup>7</sup>

<sup>1</sup> *The Star of Hope*, 9 Wall. 203;  
2 Pars. Shipping, 23.

<sup>2</sup> 2 Pars. Shipping, 23.

<sup>3</sup> Owners held not bound by the acts of the master where the latter made expensive repairs most imprudently. *Stirling v. Phosphate Co.*, 35 Md. 128.

<sup>4</sup> *The Collenberg*, 1 Black, 170; *Chouteaux v. Leech*, 18 Penn. St. 224; *Bird v. Cromwell*, 1 Mo. 81.

<sup>5</sup> *The Star of Hope*, 9 Wall. 203.

<sup>6</sup> *Hannay v. Eve*, 3 Cr. 242.

<sup>7</sup> See *Gager v. Babcock*, 48 N. Y. 154. When the master of a foreign vessel has authority to contract upon the credit of his vessel for necessary repairs, the credit of the vessel is presumed to be an element in any contract he may make for such repairs. 9 Ben. 79.

As to acts of the master terminat-



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§ 314. **The Same Subject; Master, when specially employed.** — Finally, it may be observed of the master that he may have been employed, not by the owners, but by those who have chartered the vessel for a particular voyage, in which case he may bind the charterers, and of course the ship; but probably not the owners personally, without some special authority.<sup>1</sup> Owners may otherwise confer a special agency.<sup>2</sup> And sometimes a master is appointed abroad by a consul, or any official person, agreeably to the usage of merchants, and usually in an extreme emergency, in which case he exercises the powers of an ordinary master under like circumstances.<sup>3</sup>

§ 315. **Rights and Duties of Seamen.** — Seamen, under the master's direction, and that of his subordinate officers, attend to the details of navigation; and their services are indispensable to the proper employment of the ship. This class of persons, whose generosity and improvidence are proverbial the world over, has become an object of peculiar solicitude to the courts; and there are numerous statutes enacted in England and this country, which aim to protect humanely those who navigate the deep, as men unable to protect themselves. Seamen cannot be shipped for a voyage unless the master procures fairly their signatures to shipping articles which must declare the voyage and length of time for which each

ing his employment as such at the election of the owners, see *Budge v. Mott*, 47 Wis. 611.

The owners of a vessel, as well as the master, are liable for injuries caused by the negligence or unskillfulness of the master, provided the act be done within the scope of his authority as such. *Thompson v. Hermann*, 47 Wis. 602. But where the master uses the vessel on the service of a third party, such party knowing that the employment is wholly unauthorized, the owners of the vessel cannot be held liable for damages sustained by such third party during such unauthorized employment. 9 Ben. 352. A master cannot, by selling out his interest as an owner,

confer any right to command. 11 Phila. 273. For a master's wrongful act or default, though not for an error of judgment under circumstances of great difficulty and danger, his certificate may be suspended, under the English Shipping Act of 1854. See 48 L. T. n. s. 28. Owners have a right to dismiss an officer who promotes insubordination; and the latter may forfeit his right to subsequent wages. 29 W. R. 508. And see 5 P. D. 254.

<sup>1</sup> 2 Pars. Shipping, 18, 19.

<sup>2</sup> 9 Ben. 83.

<sup>3</sup> *Ib.* See the *Cynthia*, 20 E. L. & Eq. 623; *The Jacmel Packet*, 2 Ben. 107.

shall be shipped, and be in all respects reasonable and precise.<sup>1</sup> Provisions of due quality and quantity must be furnished; the ship must be seaworthy; and by the general commercial law, seamen who become sick, wounded, or maimed in the discharge of duty must be cared for and supplied with medicines; not to speak of statutes which require vessels when bound on distant voyages to be provided with a suitable medicine chest.<sup>2</sup>

There are various ways in which seamen may be shipped, so far as concerns their compensation. Sometimes (though rarely in this country) they are employed to receive a certain proportion of the freight earned; sometimes for a certain voyage, to be paid a round sum at the close; sometimes on shares, as in the case of whaling and fishing ventures; but most commonly on monthly wages for a certain voyage or during a definite period.<sup>3</sup> If a seaman is dismissed without cause before the voyage begins, he is entitled to wages for the time he serves, besides a reasonable compensation for special damages.<sup>4</sup> Where the voyage is broken up by misfortune, or the seaman becomes disabled by sickness not caused by his own fault, the wages are still due.<sup>5</sup> And if the seaman is compelled to desert by the cruelty of the master or other officers, he may claim wages in full.<sup>6</sup> Dis-

<sup>1</sup> 2 Pars. Shipping, 34-47; 1 Stats. at Large, 131; The Juliana, 2 Dods. 504; Harden v. Gordon, 2 Mas. 541; Bright. Fed. Dig. "Seamen," 755-757; Abb. Shipping, 607. See Sweeney v. Cloutman, 2 Cliff, 85.

<sup>2</sup> 2 Pars. Shipping, 75, 78, 80; 1 Stats. at Large, 131, 132, 134; Bright. Fed. Dig. 755, 757, 771; Abb. Shipping, 615. Marine hospitals are established for the comfort of old and disabled sailors, and supported by a sort of levy upon those who earn wages; and whenever a sailor has been discharged in a foreign port, it is the duty of the American consul to see that he is paid three months' extra wages, except in case of a disaster to the vessel, rendering the discharge necessary; and to send

home seamen in other ships, if need be. And heavy penalties are visited upon the master who discharges a seaman in a foreign port against his consent, and without good cause, while the seaman may recover full indemnity for loss of time, and expenses besides. 2 Pars. Shipping, 84-88.

<sup>3</sup> Abb. Shipping, 606; 2 Pars. Shipping, 47 *et seq.*; Taylor v. Laird, 1 H. & N. 266; Bright. Fed. Dig. 764, 765.

<sup>4</sup> Parry v. The Peggy, 2 Browne Civ. and Adm. Law, 533.

<sup>5</sup> Increased danger of the service, as where war is declared by the employing government, may justify the seaman in abandoning. O'Neil v. Armstrong [1895] 2 Q. B. 418.

<sup>6</sup> See 2 Pars. Shipping, 52, 53, and

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obedience, desertion without cause, and general misconduct on the part of seamen, are severely punishable, in order that discipline may be enforced at sea ; yet the law feels the refining influences of a civilized age ; for while, in extreme cases, like mutiny, the officer in command of a ship might resort to extreme measures, even to shooting a ringleader, he is not now permitted by our statute to apply deliberate flogging, as formerly, by way of punishment.

Public sentiment sets strongly against those cruel and violent methods of discipline which petty despots at sea once deemed so essential to maintaining their own dignity ; and in general the only remedies available to enforce discipline and good behavior are forfeiture of wages, in whole or in part, extra labor, irons, and confinement or imprisonment.<sup>1</sup> Even in the matter of forfeiting wages, the courts by no means favor the master. For while a justifiable discharge of a seaman for bad conduct will work a forfeiture of wages previously earned, the maritime law does not allow a total forfeiture for a trivial irregularity, nor for a single act of disobedience, even if a violation of the shipping articles.<sup>2</sup> And where acts of insubordination have been adequately punished, a subsequent forfeiture of wages will not be allowed.<sup>3</sup>

cases cited ; *Bush v. Schooner Alonzo*, 2 Cliff. 548 ; *Barker v. Baltimore, &c. R.*, 22 Ohio St. 45 ; Bright. Fed. Dig. 772. See Act June 7, 1872, c. 322.

<sup>1</sup> Bright. Fed. Dig. "Admiralty," 26 ; 2 Pars. Shipping, 88-105 ; Act of 1850, c. 80, 9 Stats. at Large, 515.

<sup>2</sup> See Bright. Fed. Dig. Suppl. 167, "Seamen."

<sup>3</sup> *Ib.* See English Stat. 43 & 44 Vict. c. 16 (1880) as to payment of wages, seamen's lodgings, desertion, and absence without leave. Habitual drunkenness of a master may forfeit his right to wages. 5 P. D. 254.

For the payment of their wages seamen may sue *in personam* at common law with the process of sequestration. *Leon v. Galceran*, 11 Wall. 185. And they have also a lien,

which attaches to the ship and the freight, and all the proceeds thereof, and follows them into whose hands soever they may go ; and this lien is not avoided by a sale of the ship ; nor can it be subordinated to claims under a bottomry or hypothecation, though perhaps it is postponed to a collision lien ; nor does the mere loss of possession affect this privileged lien of seamen, so long as there is not delay amounting to a waiver or negligence. *Brown v. Lull*, 2 Sumner, 443 ; *Sheppard v. Taylor*, 5 Pet. 675 ; 2 Pars. Shipping, 59-62 ; Bright. Fed. Dig. 767 ; *The Great Eastern*, L. R. 1 Ad. & Ecc. 384. See also, as to action at common law, *Wilson v. Borstel*, 73 Me. 273. Expenses incurred for seamen's wages and sub-

§ 316. **Rights and Duties of Pilots.** — Pilots have important duties in connection with the steering of the ship through dangerous places; and while on board they have a control and responsibility second only to that of the master, and in some respects even greater. The word "pilot" had formerly two meanings: one was the pilot for the whole voyage, or the sea pilot, the other was the pilot who carried the ship through the harbor to which he belonged. In the latter sense the word is now generally used with us, and numerous statutes have been enacted in the several States, regulating the whole subject of a pilot's employment.<sup>1</sup>

§ 317. **Rights, etc., of "Material-men."** — One often hears of "material-men," and their liens as concerns a ship. The name "material-men" commonly applies to those who are employed to build, repair, or equip a ship, and who in general furnish work or necessary supplies for the vessel. These persons have not only a common-law lien for their work and material and supplies, but more ample liens conferred and enforced by local statutes.<sup>2</sup>

§ 318. **Methods of employing a Ship; General Ship and Charter-Party.** — *Third*, as to the manner of the ship's em-

sistence are items of charge proper to be included in the adjustment of general average. *Barker v. Baltimore, &c. R.*, 22 Ohio St. 45. Seamen held entitled to priority of payment out of proceeds of the sale of the ship in court, over material-men who furnished supplies to the vessel during their employment. 9 Ben. 187. And see 10 Ben. 155, 234, 290, 369, 385, 445. In the absence of any evidence as to the law of the place where the contract of shipment is made and is to be substantially performed, the law maritime will be presumed to control the contract. 10 Ben. 155.

Under the English Merchant Shipping Act (1854) and subsequent acts a seaman is no longer liable to imprisonment for neglecting to join his ship, but other remedies are substituted. See 11 Q. B. D. 225.

<sup>1</sup> Bright. Fed. Dig. "Navigation," 588; Abb. Shipping, 195 *et seq.*; 2 Pars. Shipping, 106-119, and cases cited. See *Steamship Co. v. Joliffe*, 2 Wall. 450; *The Levi*, L. R. 2 Ad. & Ecc. 102; *Ex parte McNeil*, 13 Wall. 236; 15 Fed. Rep. 495; *Cook v. Curtis*, 58 N. H. 507. Pilotage is made compulsory by shipping acts under various prudential circumstances. See *The Vesta*, 7 P. D. 240; [1895] 1 Q. B. 566. The owner of a ship is not necessarily exempt from liability for damages occurring while a pilot is on board; though much depends upon the statute responsibility conferred on a pilot while employed necessarily. 7 P. D. 182, 190.

<sup>2</sup> 2 Pars. Shipping, 141-145, and cases cited; Bright. Fed. Dig. 797-799; *The General Smith*, 4 Wheat.

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ployment. There are two ways in which a merchant ship may be employed for the purpose of venture and profit. One is by the owners themselves, who send the ship on some particular voyage, and agree with various parties to transport their merchandise to the place of destination; the ship thus employed being often styled a *general* ship. The other way is for an entire ship, or at least the main portion of it, to be let for a determined voyage to parties desiring it by a written instrument familiarly known as a *charter-party*.<sup>1</sup> The case is analogous to that of a man owning a warehouse, who may either occupy it for himself and sub-let as he pleases, or may lease the whole building to others at a specified rate of compensation and permit them to sub-let at their own risk.

§ 319. **The Same Subject; General Ship; Contract of Freight.**

— Where the owners use their own ship, they may, to be sure, carry their own merchandise exclusively; but in general they take that of others besides at a sum agreed upon, which sum is usually known as “freight;” this word being also applied, more loosely, to the goods themselves which are taken for hire.<sup>2</sup> The contract for carriage of goods on freight is usually considered as made by or on behalf of the owners. The ship-owners undertake and promise to carry safely in their ship the goods of the shipper to the destined port, in the usual way, without unnecessary delay or deviation; and on the other hand the shipper is bound, if the goods are so carried, to pay to the owners of the ship the freight earned by the carriage. The ship and the cargo have corresponding rights and also corresponding liens for the enforcement of those rights.<sup>3</sup> If the goods are once laden on board, the right of the ship-owners to carry them the whole distance, and to claim full freight, is complete, unless they choose to permit the shipper to take the goods out again. But if the ship-owners fail to act up to their own stipulations; if the

438; Abb. Shipping, 142; The Neptune, 3 Hagg. Adm. 129.

<sup>1</sup> Abb. Shipping, 123; 1 Pars. Shipping, 170, 171.

<sup>2</sup> Bright. Fed. Dig. 791, 792; 1

Pars. Shipping, 171; Abb. Shipping, 319, 405; Robinson v. Manufacturers' Ins. Co., 1 Met. 143.

<sup>3</sup> Ib.; Flint v. Flemyling, 1 B. &

Ad. 45; The Sch. Sarah, 2 Sprague, 31.

ship be unseaworthy, or badly manned; or if it be unnecessarily delayed in completing the voyage, the ship becomes subjected to the shipper's lien for indemnity against the loss or diminution in value of his goods, and the owners are responsible for the consequences.<sup>1</sup> In its nature the contract for the conveyance of merchandise for a round sum is an entire contract; and unless it be completely performed by the delivery of all the goods at the place of destination, the owners will, in general, derive no benefit from the time and labor expended on a partial performance; while if the owner of the cargo be the cause of its not being transported to the port of destination, full freight may be recovered.<sup>2</sup> The contract for freight is not only, generally speaking, an entire contract, in that no freight is payable unless the whole voyage is performed, but also as to the quantity of the goods, no freight being payable unless all are delivered.<sup>3</sup>

Sometimes the freight money is paid in advance, in whole or in part; in which case, if the goods are not delivered or the voyage not performed, questions somewhat perplexing may arise, which, however, are rather of fact than of law.<sup>4</sup> The voyage never having been begun, no freight money can be claimed by the owners; but, since acts of God or a public enemy, and the risks of sea perils generally, are not ordinarily assumed by those who carry merchandise in ships, any interruption which occurs after the voyage is begun, whatever be the delay it causes, if it occur from a peril of the seas and without the master's fault, as by capture and recapture, embargo, and the like, will not prevent the owners from claiming the whole freight, provided the vessel finally arrives

<sup>1</sup> Bright. Fed. Dig. 791, 795; 1 Pars. Shipping, 175-180.

<sup>2</sup> *Caze v. Baltimore Insurance Co.*, 7 Cr. 358; *Hart v. Shaw*, 1 Cliff. 358; *The Nathaniel Hooper*, 3 Sumner, 542.

<sup>3</sup> *Ib.* See 1 Pars. Shipping, 204-210; *Schouler Bailments*, § 529.

<sup>4</sup> *Manfield v. Maitland*, 4 B. & Ald. 582; 1 Pars. Shipping, 211.

The English rule, which is admitted to be harsh, and unlike that of other countries, is that payments made in advance on account of freight cannot be recovered, though the vessel be lost. *Byrne v. Schiller*, L. R. 6 Ex. 319. As to enforcing a contract for advance freight after the ship is lost, see [1891] 1 Q. B. 742.

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without avoidable delay, bringing the cargo to the port of final destination.<sup>1</sup>

§ 320. **The Same Subject.** — The contract of freight, like any other contract, may contain special stipulations, to which owners and shippers must conform; and illegal contracts of this nature are, of course, void; as, for smuggling against the laws of the country to which the ship belongs, or sailing under the license of an enemy.<sup>2</sup> So the shipper may accept his goods at an intermediate port, and thus make himself liable for freight *pro rata*, at least, and even for the entire freight if the carrier was disposed to complete the transit.<sup>3</sup> And in order that the ship-owners may earn and receive their freight, the law permits the master, if unavoidably delayed from damage to the ship or other like cause, to send his cargo forward in another vessel, or even by land conveyance, to its place of destination, and then claim full freight; and there are circumstances under which it would be clearly his duty to do so, for the benefit both of the shipper and the ship-owners. He may in an exigency charge the excess of the cost of transshipment over his freight to the owner of the goods.<sup>4</sup> But under ordinary circumstances ships are treated as "common carriers,"<sup>5</sup> the carriage of goods being, however, regulated considerably by the express terms of the bill of lading; and the merchandise must be delivered at the port of destination and to the proper parties, without unreasonable delay or damage from the ship-owners' fault. There can be no right to claim freight, ordinarily, unless delivery is made, or is prevented from being made by the act or fault of the shipper, or of the person to whom the goods were con-

<sup>1</sup> Bright. Fed. Dig. 792; Tindal v. Taylor, 4 Ell. & B. 219; Curling v. Long, 1 B. & P. 634; 1 Pars. Shipping, 220; M'Bride v. Mar. Ins. Co., 5 Johns. 299.

<sup>2</sup> See Wilson v. London, &c. Navigation Co., L. R. 1 C. P. 61; The Aurora, 8 Cr. 203; 1 Pars. Shipping, 213, 214.

<sup>3</sup> Caze v. Baltimore Insurance Co., 7 Cr. 358; Bright. Fed. Dig. 792;

Cook v. Jennings, 7 T. R. 381; 1 Pars. Shipping, 239-244.

<sup>4</sup> Rosetto v. Gurney, 11 C. B. 176; Saltus v. Ocean Ins. Co., 12 Johns. 107; Hugg v. Augusta Ins. Co., 7 How. 695; 1 Pars. Shipping, 231-238. See Thwing v. Washington Ins. Co., 10 Gray, 443; Lemont v. Lord, 52 Me. 365.

<sup>5</sup> See Schoul. Bailments, part vi., at length, as to common carriers.

signed.<sup>1</sup> Usage regulates the mode of delivery, which should be reasonable in time, place, and circumstance; and the general rule is, that a delivery on the wharf with notice to the consignee is both proper and sufficient. The wharf must be suitable for the cargo; and the master's duty, as to goods which are unclaimed or which the consignee chooses to accept, is to store them at the expense and for the benefit of all interested.<sup>2</sup>

§ 321. **General Ship; the Subject continued; Bills of Lading.**—The mutual intent of parties concerned in the carriage of goods for freight is expressed by that document of general use among commercial nations from early times, which is known as a *bill of lading*.<sup>3</sup> The bill of lading is generally signed by the master, but is sometimes signed and delivered in the counting-room of the ship-owners by their clerk. This document is in substance a written acknowledgment by the master that he has received the goods therein described for the voyage stated, to be carried on the terms stated, and delivered to the persons specified in the bill. The bill of lading is a very important instrument, being a receipt for the goods as well as a contract which expresses in writing the terms of transportation and delivery; and in order that no rights be lost to either the shipper or the owners of the vessel, it should never be signed and delivered until the cargo is fairly loaded on the vessel, and it should never be expressed in doubtful or ambiguous language.<sup>4</sup> A bill of lading is *prima facie* evidence as between the parties that the goods were, at the time of their receipt by the master, in the condition in which they are described as being; and so far as it is a contract, parol evidence cannot be allowed to control its terms, although it may explain an ambiguity; but in the

<sup>1</sup> Bright. Fed. Dig. 791; Clark v. Conn. 277. In Schouler Bailments, Barnwell, 12 How. 272; Gibson v. part vi., this subject is considered at Sturge, 10 Ex. 622; 1 Pars. Shipping, length.  
220, 245.

<sup>2</sup> Brittan v. Barnaby, 21 How. 527; 2 Pars. Shipping, 222-229; Golden v. Manning, 3 Wils. 429; Cope v. Shipping, 184 *et seq.*  
Cordova, 1 Rawle, 203; 15 Fed. Rep.

<sup>3</sup> Wills v. Sears, 1 Bl. 108; Shepherd v. Harrison, L. R. 5 H. L. 116; Abb. Shipping, 321-323; 1 Pars. Shipping, 184 *et seq.*  
<sup>4</sup> See The Keokuk, 9 Wall. 517.

265; Hodgdon v. New York R., 46



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character of a receipt it is so far open to explanation between the master and the shipper of goods.<sup>1</sup>

The bill of lading may contain, besides the usual contract to transport the goods, special stipulations regarding the discharge of the goods, and in general as to the disposal of them or their proceeds; and such stipulations, if sufficiently intelligible to indicate an agreement that the law-merchant is not to prevail in the respects specified, and if transcending no rule of public policy, will control the rights and liabilities of the parties accordingly. A bill of lading usually excepts, in so many words on behalf of the ship's owners, losses arising from the act of God, or of public enemies, and the perils or dangers of the seas; and other clauses are found inserted, such as "loss by breakage or leakage excepted;" all of which call for judicial construction in a variety of instances.<sup>2</sup>

The party who ships the goods is called the consignor, and the person to whom the goods are to be delivered by the terms of the bill is the consignee. Sometimes the shipper is both consignor and consignee; that is to say, the goods are deliverable to him or to his assigns; and it may be that the intended consignee is simply the consignor's own agent. If no person is named as consignee, usage will supply the name of the consignor and give to the bill a corresponding effect.<sup>3</sup> Bills of lading were lately signed in sets of three; one of which was held by the master, one retained by the consignor of the goods, and the third sent, either with or apart from the goods,

<sup>1</sup> *Bradley v. Duniface*, 1 H. & C. 521; *Sears v. Wingate*, 3 Allen, 103; *May v. Babcock*, 4 Ohio, 334; 1 Pars. Shipping, 188, 191; *Nelson v. Woodruff*, 1 Bl. 153. Whether acceptance of goods under a bill of lading implies a promise to pay freight, see *Elwell v. Skiddy*, 77 N. Y. 282.

<sup>2</sup> *Grill v. Iron Screw, &c. Co., L.* R. 3 C. P. 476; *Brittan v. Barnaby*, 21 How. 527; 1 Pars. Shipping, 203, 253-259; Abb. Shipping, 322. For distinction between "act of God" and "perils of the sea," see *McArthur v. Sears*, 21 Wend. 190, 198.

The element of negligence or fault on the part of the master enters very closely into the determination of the ship's responsibility for the destruction of goods through alleged perils or dangers of navigation; and proximate or remote cause of a disaster is carefully considered as in all other cases of carriage or bailment generally. *Ib.*; also *Bright. Fed. Dig.* 109, 110; *Schoul. Bailm.* part vi.

<sup>3</sup> *Chandler v. Sprague*, 5 Met. 306; 1 Pars. Shipping, 192. See *Shepherd v. Harrison*, L. R. 5 H. L. 116.

to the consignee. The consignor may, if he choose, send his copy of the bill by some other conveyance to the consignee ; and the rule is that the consignee's title is complete if the bill contains his name and is sent to him ; the goods are his with all the expense and risk, subject only to the consignor's right to stop the goods for breach of the conditions of sale before they actually arrive into the consignee's possession. If the consignor be himself consignee, and sends the bill to a third party who has ordered the goods or is to receive them, either indorsed to him or indorsed in blank, the effect is the same as if such person were named in the bill as consignee.<sup>1</sup> But if the consignor, who is at the same time consignee, sends the bill of lading without an indorsement, notice that the goods are shipped and on their way is thereby given to the party receiving the bill while the latter acquires no rights ; and this has been frequently done by merchants, the consignor sending afterwards a bill indorsed to his foreign agent or to the party ordering the goods, or in blank, with proper directions concerning its delivery upon payment of the price and full performance of the conditions of the sale.<sup>2</sup> For here we may observe that the obligation of the master to deliver the goods according to the bill of lading, and not otherwise, is so strong as to render the possession of the bill with a suitable indorsement almost conclusive evidence of ownership in the goods, as against the ship-owners ; for which reason the consignor, who ships goods to a party abroad and names him consignee, is likely to lose his goods, or the price for them, if the consignee indorses the bill to a third person for value while they are on the way, thereby defeating the consignor's right of stoppage *in transitu*.<sup>3</sup>

<sup>1</sup> Walley v. Montgomery, 3 East, 585 ; Chandler v. Sprague, *supra* ; 1 Pars. Shipping, 195, 196.

<sup>2</sup> Abb. Shipping, 529, 538 ; 1 Pars. Shipping, 196, 197.

<sup>3</sup> *Ib.* ; Brandt v. Bowlby, 2 B. & Ad. 932. See Lewis v. McKee, L. R. 2 Ex. 37 ; The Freedom, L. R. 3 P. C. 594.

The danger of issuing bills of

lading in three parts, as affecting a title, is shown in a recent English case (1882), decided on appeal in the House of Lords. It was held that a *bond fide* delivery of the goods upon presentation of the second bill of lading must prevail, notwithstanding a pledge of the goods on the first bill of lading. The inference must

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§ 322. **Transportation of Passengers by Water.**—Ships are often used to carry passengers as well as goods; and the rule as to a passenger's baggage is much the same, so far as concerns the ship-owners' liabilities, as in the case of merchandise. The rights and responsibilities of passengers who travel on railways receive constant attention in the courts; not so much, however, those who are transported in ships. Yet statutes are passed from time to time to regulate this latter subject; and an act of Congress, passed in 1871, to provide for better security of life on board steam-vessels, details fully what precautions should be used against fire, and other casualties, and makes the master and owners liable to passengers for damages, where explosion, fire, or collision is occasioned through negligence on the part of the ship's officers.<sup>1</sup> The difference in the responsibilities of a carrier

be that the pledgee, under one bill of lading, is bound to exercise some care to prevent a fraudulent disposition of the duplicates; and the old practice of issuing triplicate bills of lading should be discontinued. *Glyn Mills v. East India Dock Co.*, 7 App. Cas. 591, affirming 6 Q. B. D. 475; cf. *Barber v. Meyerstein*, L. R. 4 H. L. 317. Shipping usage may differ from that of inland carriers, as to bills of lading.

Sometimes a ship is transferred from one set of owners to another while on the voyage and before its return; while consignors of goods go on making their shipments through the master. The English rule, as lately declared applicable to such cases, is that the master, until he receives notice of the change of ownership, retains the powers which were conferred upon him by the original owners, so far as to bind the new owners by such contracts for the carriage of goods as he may enter into pursuant to his original instructions. And accordingly a privilege allowed to some consignor to take a bill of lading "free of freight,"

may, under such circumstances, continue beyond the actual change of the owners who permitted the master to give such bills. See *Mercantile, &c. Bank v. Gladstone*, L. R. 3 Ex. 233.

While the master has no authority to sign bills of lading for a greater quantity of goods than is actually put on board, yet his signature to the bills is sufficient evidence of the truth of their contents to throw upon the ship-owners the *onus* of falsifying them; but this *prima facie* evidence against the ship-owners may be rebutted, and a less quantity than that specified may be shown by them to have been actually received. See *McLean v. Fleming*, L. R. 2 H. L. Sc. 128; *Nelson v. Woodruff*, 1 Bl. 156.

As to bills of lading, see further, c. 8, *post*; also vol. ii. in connection with sales, and Schoul. Bailments, part vi. as to common carriers.

<sup>1</sup> Act Feb. 28, 1871, 440-459. And see 1 Pars. Shipping, 611-636; Abb. Shipping, 211-227; Act March 2, 1819, c. 170.

of passengers for hire, whether by sea or land, is less a difference of principle than of the state of facts to which that principle applies.<sup>1</sup>

§ 323. *Letting of Vessel on Charter-Party.* — But, instead of using their ship to carry goods on freight or for passengers, the owners may, and frequently do, let out the vessel to others, for their use. This is commonly done by a *charter-party*, an instrument well known to merchants; being a sort of maritime indenture, executed formerly under seal, but at the present day with the seal usually omitted. The usual rules apply to the construction of a charter-party and its stipulations as to contracts in general, with, however, much latitude.<sup>2</sup> There are two leading modes of chartering a vessel: the one, where the owner lets and the charterer hires the whole capacity and burden of the vessel, except so much as may be necessary for accommodating its officers and crew, and for storing its provisions, and for usual equipments; the other, where the whole vessel is surrendered to the charterer, who takes the ship empty and provides the officers, and puts on board all supplies for himself. In the former case, which is of common occurrence, the arrangement is substantially that the owners agree to carry a cargo which the charterer agrees to furnish; and here the rights and liabilities growing

<sup>1</sup> *Ib.*; *Cuddy v. Horn*, 46 Mich. 596.

The captain may and should maintain a proper police of his vessel. 30 La. Ann. 241; 87 Ill. 545. But subject and conformably to this doctrine, passengers are to be secure from injury through the negligence or misconduct of officers and crew. 88 Ill. 608.

If ship-owners issue a ticket acknowledging the receipt of money for a passage in a particular vessel, an engagement is imported on their part to furnish the conveyance, and on failure to do so the money may be recovered by the person who paid it. See *Bright. Fed. Dig. "Carriers,"* 113, 114. But see *Gillan v. Simpkin*,

4 Campb. 241. And while a common carrier may refuse to receive an objectionable passenger, and may make other reasonable regulations for the general convenience and protection of those on board, yet unreasonable regulations cannot be enforced; nor may the carrier, having received an objectionable person, take exception to his character or to his peculiar position unless he misbehave himself. *Pearson v. Duane*, 4 Wall. 605. See also Angell and other general writers on Carriers; Schoul. *Bailm.* part. vii.

<sup>2</sup> *Abb. Shipping*, 223, 241; *Bright. Fed. Dig.* 788-791; 1 *Par. Shipping*, 274 *et. seq.*

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out of possession of the ship may appear somewhat confused.<sup>1</sup> But, to determine such questions, the language of the charter-party in the particular case must be considered; though it seems that in general the party that mans the vessel is to be considered as in possession, unless the weight of evidence proves decidedly to the contrary.<sup>2</sup>

If the general owners retain the possession, command, and navigation of the vessel, and contract to carry a cargo, on freight, any charter-party would, of course, be a mere af-freightment, and the freighter would not be clothed with the character or legal responsibility of ownership.<sup>3</sup> And in a more doubtful case, the fact that the charter-party put the ship's navigation at the ship-owners' expense, might be conclusive as against making the charterer an owner *pro hac vice*, especially if the ship's whole tonnage be not let to hire.<sup>4</sup> Indeed, in the absence of any clear and determinate transfer of the rights and authority of the general owners of a vessel chartered for a voyage, such rights and authority continue.<sup>5</sup> But if the charterer is charged with the navigation of the ship, and agrees to victual and man, and to supply all requisite stores for the term specified, he has the rights and responsibilities of owner for the time being, and the ship-owners are not responsible for the supplies nor for any loss of goods; nor can they collect freight from the shipper of goods.<sup>6</sup> Sometimes one of the general owners sails a vessel on shares, under an arrangement between himself and the other owners, whereby he in effect becomes the charterer.<sup>7</sup>

§ 324. **The Same Subject.** — The ship may be chartered for one or more voyages, or for any time certain. It may also be chartered without any definite term expressed in the

<sup>1</sup> See 1 Pars. Shipping, 278.

<sup>2</sup> Bright. Fed. Dig. "Shipping," 789, 790; 1 Pars. Shipping, 279; Story, J., in *Logs of Mahogany*, 2 Sumner, 589; Abb. Shipping, 42.

<sup>3</sup> *Marcadier v. Chesapeake Ina. Co.*, 8 Cr. 39; *The Nathaniel Hooper*, 3 Sumner, 544; *Donahoe v. Kettell*, 1 Cliff. 135; *Sandeman v. Scurr*, L. R. 2 Q. B. 86.

<sup>4</sup> *Ib.*; *Hoe v. Groverman*, 1 Cr.

214; 1 Pars. Shipping, 279-281.

<sup>5</sup> *Hagar v. Clark*, 78 N. Y. 45.

<sup>6</sup> Bright. Fed. Dig. 789; *Mott v. Ruckman*, 3 Bl. C. C. 71. See also *McGilvery v. Capen*, 7 Gray, 523; *Newberry v. Colvin*, 7 Bing. 190; s. c. 1 Cl. & F. 283; *The Great Eastern*, L. R. 2 Ad. & Ecc. 88.

<sup>7</sup> *Thorp v. Hammond*, 12 Wall. 408.

contract; in which case the law implies a reasonable term, compelling the parties to regard the charter as in force during the whole of any voyage, once undertaken by the charterer before reasonable notice of intention to terminate the charter is given; since otherwise the bargain would be a perilous one for the charterer, from a pecuniary point of view. Subject to this qualification a charter-party for no definite term is determinable by either party at pleasure.<sup>1</sup> The burden and nationality of the ship are usually expressed in the charter-party; and for a fraudulent misrepresentation in either respect to the charterer's disadvantage, the owners must suffer.<sup>2</sup>

So, too, it is common for the charter-party to provide for the state of the ship and for repairs; the usual way being for the owner to stipulate that the ship is sound, staunch, and altogether seaworthy; and, further, that he will keep the ship in repair, perils of the sea and unavoidable accident excepted. Even if the contract were silent as to such stipulations, the law would probably supply them; and for detriment sustained by the charterer through unseaworthiness of the vessel, such as he had not foreseen, there is little doubt that he can get indemnity from the ship-owners, by holding back a suitable portion of the sum he agreed to pay as charter-money, or otherwise.<sup>3</sup> But the charterer, in absence of any agreement to the contrary, should victual and man the vessel; though in this and in other respects the parties to the

<sup>1</sup> 1 Pars. Shipping, 282, 283; *Have-lock v. Geddes*, 10 East, 555; *McGillvery v. Capen*, 7 Gray, 525.

<sup>2</sup> *Ashburner v. Balchen*, 3 Seld. 262; *Hunter v. Fry*, 2 B. & Ald. 421.

<sup>3</sup> 1 Pars. Shipping, 283-285; *Bright. Fed. Dig.* 788. See *Richardson v. United States*, 2 N. & H. 483. When the owner of a vessel chartered her, there is, in the absence of anything expressed to the contrary, an implied contract that she is seaworthy and suitable for the service in which she is to be employed. The owner

is obliged to keep her in proper repair, unless prevented by the perils of the sea or unavoidable accident. He is not excused for any defect, known or unknown; and a defect which is developed without any apparent cause is presumed to have existed when the service began. Where, however, a hirer uses a vessel which afterwards proves defective, he must pay for the use to the extent of the use. *Work v. Leathers*, 97 U. S. 379.

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charter-party may make different stipulations, if they see fit.<sup>1</sup> It is usual for the master to sign and give bills of lading in the same manner as if there were no charter-party; yet, so far as the charterer and his goods are concerned, this amounts to little more than evidence of the delivery and receipt and shipping of the merchandise; for the charter-party controls the bill of lading with regard to the terms and provisions which the two instruments have in common.<sup>2</sup>

By delivery of the vessel to the hirer, and its acceptance, the charter-party is confirmed and adopted; and any wrongful act or breach of engagement by the one party to such a bailment, furnishes a basis of legal redress to the other.<sup>3</sup> On the other hand a re-delivery of the vessel and its acceptance by the owner justifies the presumption that the term of hire is ended.<sup>4</sup>

§ 825. *The Same Subject; Time as an Essential; Demurrage.* — Time being an element of much importance in all business transactions, and in commercial affairs especially, the parties to a charter-party are held to the rule of punctuality in their mutual engagements; hence, if the ship be not ready at the proper time and a material delay is probable, the charterer is at liberty to seek another ship; while, if the cargo be not ready, the owners may seek another cargo.<sup>5</sup> If the ship-

<sup>1</sup> *Goodridge v. Lord*, 10 Mass. 483, 486; 1 Pars. Shipping, 285. See *Reed v. United States*, 11 Wall. 591.

<sup>2</sup> *Lamb v. Parkman*, 1 Spr. 343; 1 Pars. Shipping, 286-288.

Any discrepancy as to terms of freight between the bill of lading and charter-party would be rectified by reference to the latter, whether the owners had a controversy with the charterer himself or with any person shipping goods with knowledge of the charter-party. 1 Pars. Shipping, 287; *Faith v. East India Co.*, 4 B. & Ald. 630. But if the bill of lading were indorsed for value to one having no notice or knowledge of the terms of the charter-party, it is held that the indorsee may insist upon the terms

stated in the bill of lading; and so, too, it would be with sub-freighters of the ship who knew nothing about the charter-party. See *Foster v. Colby*, 3 H. & N. 705; *Fry v. Bank of India*, L. R. 1 C. P. 689; *Faith v. East India Co.*, 4 B. & Ald. 630. There should be no duress as to such contracts. *McPherson v. Cox*, 86 N. Y. 472.

<sup>3</sup> 146 U. S. 483; *Meissner v. Brun*, 128 U. S. 474.

<sup>4</sup> 146 U. S. 483.

<sup>5</sup> *Seeger v. Duthie*, 8 C. B. x. s. 45; *Weisser v. Maitland*, 3 Sandf. 318; 1 Pars. Shipping, 310. *Aliter* where the charter-party makes no stipulation as to the time of loading. *Culliford v. Vinet*, 128 U. S. 135.

owners retain control of the vessel, the voyage must be performed in as short a time as is consistent with safety, and for any culpable negligence by which the voyage is protracted, they must suffer the consequences.<sup>1</sup> And it is said that the charterer must load and unload with all reasonable despatch; that the owners must give him all reasonable facilities; and that for non-performance of these obligations, on either side, the injured party may have his remedy, without any express stipulations.<sup>2</sup> The question what is a reasonable time, under such circumstances, is one of fact for a jury to determine, unless the parties have specified the period for themselves.<sup>3</sup>

But obligations of this sort are usually provided for as *demurrage*, a term which signifies the delay of a vessel by the charterer beyond the time allowed for loading, unloading, or sailing; also the payment for such delay. For it is almost always provided that the charterer may have so many days for loading and unloading the ship, and that he may detain the ship longer, if he will pay so much for the detention. The object of this provision was doubtless to make the charterer save time as much as possible, and to give the owners compensation for such time as he might have saved and did not; its practical application is to charters for a specified voyage, rather than for those on time. If, then, a ship be chartered for a specified voyage, there are days which belong to the charterer and for which he does not pay; and these are called "lay days," — or "working days," with reference to the labor of loading and unloading.<sup>4</sup> Lay days do not usually commence until the ship has arrived at the place for loading or unloading, though this rule may be affected by usage or the stipulation of the parties.<sup>5</sup> The parties may stipulate that the charterer shall be liable for

<sup>1</sup> *Sieveking v. Maas*, 6 Ell. & B. 674; *The Barque Gentleman*, 1 Bl. C. C. 196.

<sup>2</sup> 1 Pars. Shipping, 311. If the charterer is the cause of a failure to deliver the cargo according to the charter-party, the ship is entitled to the stipulated freight. *Gage v. Maryland Coal Co.*, 124 Mass. 442.

<sup>3</sup> See *Cross v. Beard*, 26 N. Y. 85.

<sup>4</sup> See 1 Pars. Shipping, 310-318; *Brooks v. Minturn*, 1 Cal. 481; *Cochran v. Retberg*, 3 Esp. 121; *Bouv. Dict. "Demurrage;" Abb. Shipping*, 308 *et seq.* See *Gray v. Carr*, L. R. 6 Q. B. 522.

<sup>5</sup> *Lacombe v. Waln*, 4 Binn. 299; *Pyman v. Dreyfus*, 24 Q. B. D. 152.



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no delay of the vessel which is not caused by his own fault ; but, unless this is done, some have thought that for such special delays as occur by capture, embargo, or through stress of weather, the owners of the ship may claim demurrage compensation, the fault not being their own.<sup>1</sup> Perhaps, however, if the voyage were broken up altogether, as in case of condemnation as prize, it would be held that the charter-party came to an end, and the charterer's liabilities along with it.<sup>2</sup> And while it is generally admitted that the fact of the delay being caused by the act of God, or other *vis major*, does not relieve the charterer or freighter from liability, where he has entered into a positive undertaking to load or discharge a cargo in a given number of days, yet the English courts refuse to extend such a liability to an implied contract for reasonable diligence only.<sup>3</sup> Demurrage, so called, can be recovered only where it is reserved by the charter-party or bill of lading ; and where no such express reservation exists, the remedy appears to be by action on the case in nature of demurrage, for damages for the detention.<sup>4</sup>

<sup>1</sup> See 1 Pars. Shipping, 314-316, and *n.* ; *Towle v. Kettell*, 5 Cush. 18.

<sup>2</sup> 1 Pars. Shipping, 318. And see *ib.* 328-337, as to acts of government in war which go to dissolve a charter-party. See, for a liberal allowance of demurrage on two voyages made, notwithstanding a third was abandoned, *Elwell v. Skiddy*, 77 N. Y. 282. But as restricting the right to demurrage, see *Hodgdon v. New York, &c. R.*, 46 Conn. 277 ; *Whitehouse v. Halstead*, 90 Ill. 95.

<sup>3</sup> *Ford v. Cotesworth*, L. R. 5 Q. B. 544. London dock strike necessitating delay held no subject for demurrage against the consignee. [1893] App. C. 22.

<sup>4</sup> *Gage v. Morse*, 12 Allen, 410 ; *Young v. Moeller*, 5 Ell. & B. 755. The government sometimes chartered a merchant vessel for its own purposes ; as, for instance, where some public exigency has occurred, and soldiers and army supplies are to be

transported from place to place. But the terms of the contract must be studied, in order to ascertain the mutual liabilities in any such case. For where the United States authorities ordered owners of a vessel, during the late rebellion, to get her ready, under pain of impressment, to transport a cargo to a particular place and back (which order was obeyed, though under protest), the effect was to leave the possession with the general owners under a contract with government for a *per diem* compensation from the commencement of the voyage until the same was broken up, with the further addition of so many days as would have been spent, if no disaster had occurred in completing the return trip. *Reed v. United States*, 11 Wall. 391. And the ship having been blown aground, and destroyed months after by an ice freshet, the voyage was held to be completely broken up. *Ib.* But where the government con-

§ 326. **Charter-Parties how modified; how construed.**— Modifications of a charter-party may be constituted, as between charterer and owners, by letter or otherwise, like any other written contract.<sup>1</sup> And the cases are very numerous which turn upon the construction of particular clauses contained in a charter-party.<sup>2</sup> In general, a charter-party is viewed like any contract and requires mutual assent; and where there is any material part of the instrument to which both parties have not agreed, the entire instrument is vitiated.<sup>3</sup>

§ 327. **Marine Torts and Perils.**— *Fourth*, as to marine torts and perils peculiar to navigation. This will lead us to consider particularly the subjects of collision, salvage, and general average.

§ 328. **The Same Subject; Collision.**— Where two vessels strike one another, causing damage to one or both, the disaster is that of collision. Such accidents are of common occurrence in our crowded harbors, and not unfrequently at sea, or along the coast. To avoid them as far as possible,

tract for the vessel was one of hiring and the government had exclusive possession and management, rent or hire money for the ship was due, whether the vessel was in continuous service or not. *United States v. Shea*, 152 U. S. 178.

<sup>1</sup> *Boyd v. Moses*, 7 Wall. 316.

<sup>2</sup> Thus, a stipulation to take a cargo of "lawful merchandise" is held to imply that the articles which compose the cargo shall be in such condition, and be put up in such form, that they can be stowed and carried without one part damaging another. *Ib.* And a memorandum in the bill of lading "not accountable for leakage" has been considered broad enough to cover not only ordinary leakage, but all leakage which was not negligently occasioned. *Ohrloff v. Briscall*, L. R. 1 P. C. 231. The custom of the loading port may explain the meaning of such expressions as "a full and complete cargo." See

*Duckett v. Satterfield*, L. R. 3 C. P. 227; *Southampton, &c. Co. v. Clarke*, L. R. 4 Ex. 73. And, indeed, mercantile usage is greatly regarded, in cases of doubtful construction; though usage can never be suffered to control express declarations. Whether certain covenants contained in a charter-party are independent or mutual; what are the stipulations concerning the "sailing" or "departure" of a vessel from a particular port,—all such questions and numerous others are to be referred to the usual principles of contracts; with perhaps this qualification, that the courts of admiralty strive, so far as is consistent with right, to interpret maritime contracts according to the mutual intention of the parties, however careless the latter may have been in the choice of language. See 1 *Pars. Shipping*, 318-324; *Lovell v. Davis*, 101 U. S. 541.

<sup>3</sup> 146 U. S. 483.

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and in order that the blame where a collision occurs shall be laid where it belongs, suitable regulations for navigation are established, either by statute or general usage. It is the duty of all masters and crews to observe these rules carefully; and if a collision takes place for failure to do so, the vessel in fault is usually compelled to pay all the damages resulting; while if both vessels are in fault the loss will be divided.<sup>1</sup> Perhaps if the fault were vastly greater on one side than the other, though both vessels were somewhat to blame, there might be an equitable apportionment of the damages; but such is not the prevailing practice.<sup>2</sup> If neither vessel be in fault, the loss rests where it falls.<sup>3</sup> The ship that is not disabled is bound to render all possible assistance to the other, particularly so as to save human lives, though the latter may be alone in fault; and this duty, which humanity enjoins, is now enforced in England by statute.<sup>4</sup>

The statutes which regulate the navigation of vessels as concerns the United States are chiefly those of 1864 and 1867, with subsequent additions and amendments.<sup>5</sup> In England, regulations have been promulgated from time to time, by way of orders in council, and statutes have been enacted; and among the latter may be mentioned the statute of 25 & 26 Vict. c. 63, passed in 1862, upon which, as modified by an order in council, Jan. 9, 1863, our act of 1864 is based. The rules of navigation relate in part to lights, in part to fog signals, and in part to the method of steering the vessel, and the precautions proper when approaching another vessel.<sup>6</sup>

<sup>1</sup> The *Gray Eagle*, 9 Wall. 505; The *Carroll*, 8 Wall. 302; The *Potomac*, 8 Wall. 590; Bright. Fed. Dig. (Suppl.) "Navigation;" *Vaux v. Sheffer*, 8 Moore P. C. 75; The *Sapphire*, 11 Wall. 164; 106 U. S. 17, 154. See as to limitation by the value of the vessel, *Beatty v. Hanna*, 122 U. S. 97.

<sup>2</sup> See 1 Pars. Shipping, 527, 528.

<sup>3</sup> 1 Pars. Shipping, 525, and cases cited; Bright. Fed. Dig. 583-586.

<sup>4</sup> The *Celt*, 3 Hagg. Adm. 321; 25 & 26 Vict. c. 63, § 33.

<sup>5</sup> And see U. S. Rev. Stats. §§ 4233-4251.

<sup>6</sup> See 1 Pars. Shipping, 548 *et seq.*; Maude & Poll. Shipping, 3d ed. 449-465. English regulations for preventing collisions at sea, made under the authority of the English merchant shipping acts, 1854 to 1873, must, under 36 & 37 Vict. c. 85, § 17, be strictly followed. 5 App. Cas. 876. And see new Orders in Council [1893] P. 343. As to rules for navigating the Thames, see 5 P. D. 276. Wherever a statute regulation is disregarded

§ 329. **The Same Subject; Salvage.** — Salvage is a word which is used in two different senses. Its ordinary meaning,

by a vessel, it lies on that vessel to show that the accident in case of collision was not owing to such neglect; but if it is shown that the accident was due wholly to other causes, and that this breach of the statute did not contribute to the collision, the violation will have no effect. *Waring v. Clark*, 5 How. 465; *Mackay v. Roberts*, 9 Moore P. C. 368; *The Fannie*, 11 Wall. 239; *The Farragut*, 10 Wall. 334. But wherever there is a positive breach of statute, the burden of exoneration rests very heavily upon the vessel under the latest decisions. *Belden v. Chase*, 150 U. S. 674. Regard is paid to the situation and circumstances of each vessel in prescribing rules of navigation; and that one which can avoid disaster more readily than the other is usually required to take more active measures. Thus, a steamer approaching a sailing vessel is bound to keep out of her way; steamers having no tow must regard with care those having them; a ferry boat accustomed to a harbor should steer clear of a vessel coming in from sea and anchoring in a fog; and a ship sailing before the wind is expected to avoid one which is close-hauled, the latter keeping its course. *The Fannie*, 11 Wall. 238; *The Carroll*, 8 Wall. 302; *The Johnson*, 9 Wall. 146; *The Syracuse*, 9 Wall. 672; 2 Cliff. 551; *The Gregory*, 6 Blatchf. 528; *The Spring*, L. R. 1 Ad. & Ecc. 99; *The Abbotsford*, 98 U. S. 440; 102 U. S. 214. And if the steamer must keep out of the way of a sailing vessel, it is equally imperative on the latter to keep her course. *The Illinois*, 103 U. S. 298; 144 U. S. 371. A ship being towed by a tug, ship and tug are, as a rule, to be treated as one vessel under steam. 103 U. S. 699.

Steamers navigating in the dark or in a crowded harbor or during a fog are bound to move with great care; and if unusual manœuvres are attempted, where a collision is imminent, the manœuvring vessel should make sure that the other understands in season and makes corresponding movements. *The Johnson*, 9 Wall. 146; *The Corsica*, 9 Wall. 146; *The Syracuse*, 9 Wall. 672; *The Kirby Hall*, 8 P. D. 71. As to other violations of sailing rules in determining blame, see *The Annie Lindsley*, 104 U. S. 185; 75 N. Y. 116; *Kennedy v. Steamboat Co.*, 12 R. I. 23. A steamer is not bound to change her course for a row-boat. *Philadelphia R. v. Adams*, 89 Penn. St. 31. We may observe further that the conduct of the vessels while approaching each other is regarded in determining which of the two is essentially to blame; not merely the moment before collision, when a slight mistake during the confusion might be inadvertently made by the one without affecting the general liability properly imposed upon the other for its carelessness. See *The Carroll*, 8 Wall. 302. The question is, which vessel substantially caused the disaster; though the vessel claiming damage should not appear really culpable as contributing thereto. And while the omission of a vessel to exhibit the proper signal lights, or showing the wrong one, puts it *prima facie* in the wrong, this does not absolve other vessels from the consequences of their own negligence. *The Gray Eagle*, 9 Wall. 505; *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; 4 P. D. 219. If a proper lookout was not employed on a vessel, as required by law, it should be asked whether his absence had anything to do in causing the collision. *The Fannie*,

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in admiralty, is that compensation which the maritime law gives for service rendered in saving a ship or its cargo from

11 Wall. 238 ; Thorp v. Hammond, 12 Wall. 408 ; The Clara, 102 U. S. 200. Racing to enter a harbor first would render a vessel culpable, if collision resulted. The Spray, 12 Wall. 368. But even if flagrant fault be committed by one vessel, the other is bound to adopt every proper precaution to avoid the collision imminent, or it will be treated as equally liable for the consequences. The Maria Martin, 12 Wall. 31 ; The Sapphire, 11 Wall. 164. A vessel aground at night in a navigable channel should apprise other vessels of its position. The Industria, L. R. 3 Ad. & Ecc. 303. It is a rule that inevitable accident which proper skill and precaution could not prevent relieves from the liabilities attending a collision. The Louisiana, 3 Wall. 164 ; 1 Pars. Shipping, 525 ; The Virgil, 2 W. Rob. 201 ; Stainback v. Rae, 14 How. 532 ; Bright. Fed. Dig. 587. But a collision arising from the negligence of the crew is not damage of the seas within the meaning of an exception in a bill of lading. Grill v. Collier Co., L. R. 1 C. P. 600. See The Ariadne, 13 Wall. 475. One vessel brought into jeopardy by another's fault is not held culpable for want of perfect skill and presence of mind in the extremity of danger. Blue Jacket v. Tacoma Mill Co., 144 U. S. 371.

There are cases which hold that where the value of the vessel at fault is not enough to satisfy a claim for collision, the homeward freight on the cargo is liable to contribute to satisfy it, though the cargo itself should be released. The Orpheus, L. R. 3 Ad. & Ecc. 308 ; The Flora, L. R. 1 Ad. & Ecc. 45. But English statutes now qualify and limit the liability of ship-owners for a collision occurring without their fault or priv-

ity. See the Velasquez, L. R. 1 P. C. 494 ; The Obey, L. R. 1 Ad. & Ecc. 102 ; The Iona, L. R. 1 P. C. 426 ; The George and Richard, L. R. 3 Ad. & Ecc. 466 ; 5 P. D. 6. The maritime law of limited liability is adopted by U. S. Rev. Stats. §§ 4282-4289. The Scotland, 105 U. S. 24 ; 105 U. S. 451. See 122 U. S. 97.

In measuring the damages in a case of collision, loss of freight, detention, expense, and all the other direct and immediate consequences, will be taken into consideration. For *restitutio in integrum* is the leading maxim applicable to injuries from collision. Bright. Fed. Dig. 586, 587 ; The Countess of Durham, cited 1 Pars. Shipping, 538 ; The Baltimore, 8 Wall. 377. As to the injured vessel, where repairs are practicable, the damages assessed shall, in general, be sufficient to restore it to the condition in which it was at the time the collision occurred ; and where new materials for repairs are furnished in place of the old, the deduction usual in insurance cases cannot be made, though the value of the vessel be thereby enhanced. The Baltimore, 8 Wall. 377. The fact that the injured vessel is sunk does not necessarily imply that there is a total loss ; nor should vessel or cargo be abandoned, unless it appears that the vessel could not be raised or saved, or that the cost of raising and repairing it would exceed its value after the repairs were made. *Ib.* Where two vessels are in fault, the injured party may proceed against both together and hold both liable for the collision ; in which case the damages are properly apportionable equally between the two vessels, while the claimant may collect the entire amount of either, if the other is unable to respond for a due propor-

peril; and in that sense we shall here regard it. The other meaning of the word, not uncommon among insurers, is the property which is saved from a wrecked vessel.<sup>1</sup> In order to give the claim of salvage the subject rescued should be employed in navigation;<sup>2</sup> and salvage service of the higher grade involves one's peril of life, limb, or property, — gallantry, courage, or heroism.<sup>3</sup>

It is a leading rule that salvage services must be performed by persons not legally bound to render them. Thus, the master and crew cannot in general be treated as salvors of their own ship and cargo; for it would be an unwise policy to tempt those whose duty it is to stand by the vessel and all it carries, to invite danger for the sake of extra profit.<sup>4</sup> Yet there are circumstances under which seamen have been allowed to claim, on the ground that their contract with the vessel saved was at an end, or because the service performed was entirely out of the line of their duty.<sup>5</sup> Pilots and passengers, too, according to the best authorities, may become salvors when they perform services to a ship in distress beyond the line of their duty; and certainly the duties of passengers in and about a ship are much less than those of master, pilot, or crew, who are hired to manage it.<sup>6</sup> The statutes of our States are quite liberal, too, in giving pilots extra compensation for extraordinary services; and, on the whole, American cases seem rather more favorable to salvage

tion. *The Washington and The Gregory*, 9 Wall. 513. And see 97 U. S. 309, 323; 103 U. S. 710.

The latest cases relating to collision are very numerous, as reference to the latest English and American annual digests will show; and the present writer undertakes in this volume no more than a general analysis of the essential principles. The U. S. District and Circuit Court series (*e.g.* Blatchford's and Benedict's reports) contain many decisions of value under this head.

<sup>1</sup> Bouv. Dict. "Salvage;" 2 Pars. Shipping, 260.

<sup>2</sup> A fixed structure, like a dry dock, is not a subject of salvage service. *Cope v. Dry Dock Co.*, 119 U. S. 625.

<sup>3</sup> 122 U. S. 256.

<sup>4</sup> Bright. Fed. Dig. "Salvage," 749; 2 Pars. Shipping, 264, 266.

<sup>5</sup> *Ib.*; *Mason v. The Blaireau*, 2 Cr. 240; *The Florence*, 20 E. L. & Eq. 607.

<sup>6</sup> *Akerblom v. Price*, 7 Q. B. D. 129; *Newman v. Walters*, 3 B. & P. 612; 2 Pars. Shipping, 268-271. The principle of remuneration for salvage by an agent is discussed in [1892] P. 366.

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claimants than those of the mother country. Revenue officers, and persons belonging to the United States navy, and troops on a transport, have been allowed salvage.<sup>1</sup> So has a corporation chartered for saving vessels; though in this case it seems to be rather for the use of apparatus furnished and skill in handling it than on the ordinary principle which regards personal gallantry and sacrifice.<sup>2</sup> And even a steam-tug, towing fire-engines from a wharf into a harbor where a vessel is on fire, and rendering prompt and useful service with the fire-engine company, may claim salvage, as may also the fire department.<sup>3</sup> Nothing, indeed, according to the principles announced in the Supreme Court of the United States, will bar a meritorious claim for salvage, on the part of those not ordinarily concerned in and about the rescued vessel, short of a contract to pay a given sum for the services or a binding engagement to pay at all events.<sup>4</sup> And where two ships belong to the same owner, the crew of the one may recover salvage reward for assistance rendered to the other, in a meritorious case.<sup>5</sup>

It is, however, a general rule that none can claim salvage who did not aid and participate directly in the salvage service, or promote those services by doing the work of those rendering them; some exceptions being made on the principle of agency.<sup>6</sup> Nor can salvage accrue from a wrong; as where the master and crew of one vessel save the cargo of the other from perils resulting from a collision in which both were to blame.<sup>7</sup> As to steamboats assisting vessels in distress, a distinction must be made between the agreement to tow a vessel whole or disabled, and the rendering of an extraordinary service outside of that agreement, and of

<sup>1</sup> Bright. Fed. Dig. 748, 749; 2 Ecc. 142, distinguishing *The Maria Para. Shipping*, 272, 273; *United States v. The Amistad*, 15 Pet. 518. *Jane*, 14 Jur. 857; s. c. L. R. 3 P. C. 690.

<sup>2</sup> *The Camanche*, 8 Wall. 448; *The Morning Star*, 6 Blatchf. C. C. 154. <sup>6</sup> *The Camanche*, *supra*; *The Vine*, 2 Hagg. Adm. 1; *The San Bernardo*, 1 Rob. Adm. 178; 2 *Para. Shipping*, 277, 278.

<sup>3</sup> *The Blackwell*, 10 Wall. 1.

<sup>4</sup> See *The Camanche*, 8 Wall. 448; *The Waverley*, L. R. 3 Ad. & Ecc. 309. <sup>7</sup> *Cargo ex Capella*, L. R. 1 Ad. & Ecc. 356. And see Bright. Fed. Dig. 749, 750.

<sup>5</sup> See *The Sappho*, L. R. 3 Ad. &

course deserving further compensation. And here it is not even necessary that there should have been any actual interruption in the towage; for the vessel contracting to tow becomes a salvor when such supervening circumstances have occurred as justify an abandonment of the contract, — where, for instance, there is a serious danger, not contemplated by the parties when the contract was made.<sup>1</sup> But where a vessel which contracts to tow a disabled ship is compelled to leave her in a more dangerous position than before, there may be a claim for towing but none for salvage.<sup>2</sup>

§ 330. **The Same Subject.** — The courts are very liberal in deciding what constitutes a salvage service. Keeping near a vessel in distress, boarding it for a message, giving advice, transshipping a cargo, aiding to put out a fire, — any and all of these services may give a salvage claim; the reward being mainly for gallantry in the hour of peril, which goes in a material degree towards preserving the ship, its appurtenances, or its cargo; and a service is a salvage service whether rendered while the vessel is at sea or when it is off the coast.<sup>3</sup> Nor, as it has been frequently ruled, is it necessary that the distress should be actual or immediate, or that the danger should be imminent and absolute; it is sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose it to destruction if the services were not rendered.<sup>4</sup> But no claim for salvage is allowable unless the property in question was in point of fact saved from destruction.<sup>5</sup> Articles derelict — as, for instance, a

<sup>1</sup> *The Potter*, L. R. 3 Ad. & Ecc. 292. See 2 Pars. Shipping, 274–277.

To bar a meritorious claim for salvage by special contract, such contract should at least permit of some recompense for services rendered in case of calamity. 123 U. S. 40. Salvage claims rest, not upon contract, but upon the right to be paid out of what is rescued. See [1895] P. 193.

<sup>2</sup> 14 P. D. 3. Cf. 14 P. D. 132.

<sup>3</sup> 2 Pars. Shipping, 285–287; *The Westminster*, 1 W. Rob. 229; Bright. Fed. Dig. 749.

<sup>4</sup> *The Charlotte*, 3 W. Rob. 68, 71; 2 Pars. Shipping, 283; *The Saragossa*, 1 Ben. 551.

<sup>5</sup> Bright. Fed. Dig. “Salvage,” 747. Salvage service may consist essentially in towing the disabled vessel. 42 L. T. 594. Cf. [1893] P. 154.



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ship which has been fully and finally abandoned by her crew, with no hope of saving or recovering it — follow a rule somewhat peculiar at the common law; belonging, in England, as they did for some time, to the Lord High Admiral, and afterwards to the sovereign; and wrecks, by which is meant property cast ashore, often vested in the lord of the manor; but the disposition to be made of property thus abandoned is now frequently regulated by statute.<sup>1</sup> The amount of salvage compensation to be awarded in a given case will depend greatly upon the circumstances shown as to danger to vessel, hazard of exposure, value, length of service, and so on. There is no fixed rule as to amount; and our tribunal of final appeal is quite reluctant to disturb an award made in the court below.<sup>2</sup> A moiety was given in old times where there had been a derelict; and where the case is exceedingly meritorious, this is still given as perhaps a maximum rate of salvage compensation; but more frequently the salvage allowed on derelict is nearer one third of the value of the property, and on property not derelict a much lower rate.<sup>3</sup> Salvage for saving life, unconnected with property, is not allowed; but if life be saved, it may enhance the amount of salvage allowed on the property.<sup>4</sup>

<sup>1</sup> See 2 Pars. Shipping, 288-292, and cases cited; Act 17 & 18 Vict. c. 104, §§ 471-475; Bright. Fed. Dig. 258, 750. See *post*, vol. ii. part iv. c. 1.

<sup>2</sup> *The Camanche*, 8 Wall. 448; *Post v. Jones*, 19 How. 150, 161; 2 Pars. Shipping, 292, 293; *The Aquila*, 1 Rob. Adm. 37, 45. See *The Zealand*, Lowell, 1, where the whole proceeds of a small derelict were given to salvors.

<sup>3</sup> *Ib.*; Bright. Fed. Dig. 752, 753; 8 P. D. 24, 65.

<sup>4</sup> Bright. Fed. Dig. 747; 8 P. D. 115. Violent and overbearing conduct on the part of salvors may be ground for reducing the amount of salvage reward. 7 P. D. 203. Nor will an oppressive special agreement for salvage be enforced. *The Silesia*,

5 P. D. 177. Whatever the nature of the property thus saved, whether it be ship, cargo, or freight, a salvage compensation is usually decreed. To this rule, however, exceptions are sometimes made, out of regard, perhaps, to decency or the meanness of the claim. See Bright. Fed. Dig. 747; 2 Pars. Shipping, 302-305; also, *Tome v. Dubois*, 6 Wall. 548; L. R. 3 Ad. & Ecc. 487. Bullion saved must contribute for salvage. 6 P. D. 60. Wherever courts of admiralty can take jurisdiction, they will in general enforce the lien for salvage service; nor will they apparently forego making government liable like an individual, provided only the property can be held by judicial process; for, as a matter of principle, personal property of the United States

§ 331. **Average in Maritime Losses.**—The principle of “general average” has been applied to maritime losses from the earliest days of commerce; it was part of the law of Rhodes, and in fact prevailed along the Mediterranean and Adriatic seas, while as yet Greece and Rome had but a feeble existence.<sup>1</sup> No rule of the kind has ever yet been enforced as against property on land, though often it might fairly be applied; yet when, for the common benefit, property is partially destroyed at sea, or expenses necessarily incurred, this principle of general average comes in to apportion the loss; so that no one may lose more than his fair share. Ship and cargo are thus regarded as combined in a perilous adventure. There is a certain equity in the doctrine; for, as it is well observed, common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary loss or expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure.<sup>2</sup>

on board of a vessel, for transportation, is bound to respond for salvage services rendered in saving the property. *The Davis*, 10 Wall. 1. But ships of war enjoy some peculiar immunities. See *L'Invincible*, 1 Wheat. 238; *The Santissima Trinidad*, 7 Wheat. 283. And, furthermore, what is called military salvage is sometimes allowable in case a vessel or other property is captured by an enemy and then recaptured before condemnation as prize by a competent tribunal. 2 Pars. Shipping, 315; *The Adeline*, 9 Cr. 244; Bright. Fed. Dig. 750. Sometimes there is more than one set of salvors; as, for instance, where a salvaging vessel falls into distress, and another comes up to assist; and here both sets must take their due proportion; but unnecessary interference of any sort, whether by one set of salvors or

another, can give no claim for salvage against the vessel intruded upon. 2 Pars. Shipping, 279–282; *The Fleece*, 3 W. Rob. 278; *The Mary*, 2 Wheat. 123; Bright. Fed. Dig. 748. And it is ruled that a vessel is not liable for the salvage due from the cargo, nor the cargo for that due from the vessel, but each must pay its own portion. *The Pyrennee*, Brow. & L. Adm. 189. As to proceedings by libel for salvage, see *The Sabine*, 101 U. S. 384. Proceedings *in rem* and *in personam* should not thus be joined. *Ib.* Those entitled to salvage may apportion the amount among themselves by fair agreement. 5 P. D. 192.

<sup>1</sup> Dig. 14, 2; Abb. Shipping, 473; 1 Pars. Shipping, 339.

<sup>2</sup> Clifford, J., in *The Star of Hope*, 9 Wall. 228.

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There appears to be some confusion as to the exact definition of the term "general average." Some apply this term to the contribution; others, such as Parsons, to the loss itself which is averaged, — the expense, the sacrifice, the damage, according to circumstances.<sup>1</sup> But a "general average contribution" is defined properly as "a contribution by all the parties in a sea adventure to make good the loss sustained by one [or more] of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise."<sup>2</sup> General average losses, then, are divided into two classes: (1) those which result from the sacrifice of part of the property; (2) those resulting from the extraordinary expense necessarily incurred.<sup>3</sup>

Some attempts have been made to limit the application of the general average rule, so as to exclude from its operation, by a sort of quibble, sacrifices made where otherwise the whole adventure would have been a total loss, and in cases of voluntary stranding; but the latest cases of authority in this country give little sanction to such an interpretation, but on the contrary regard the rule as therein applied with liberal favor.<sup>4</sup> Voluntary stranding is, in these days, to be made good by general contribution. The stranding of a ship is voluntary, whenever the will of man in some degree contributes to the result, though the existence of the particular reef or bank on which the vessel grounds was not before known to the master, and though he did not intend to strand the vessel thereon; provided he was aware that this danger

<sup>1</sup> See Bouv. Dict. "Average;" 1 Pars. Shipping, 338, and n.; Wadsworth v. Pacific Ins. Co., 4 Wend. 33; 3 Kent Com. 232; Bright. Fed. Dig. "Average," 67.

<sup>2</sup> See The Star of Hope, 9 Wall. 228; 2 Arn. Ins. 770.

<sup>3</sup> *Semble* that the right to general average is not founded upon contract,

or the relation created by contract; but upon a rule of the common law, and upon the principle of the ancient maritime law. Pirie v. Middle Dock Co., 44 L. T. n. s. 426.

<sup>4</sup> See The Star of Hope, 9 Wall. 228; Maude & Poll. Shipping, 320; Barnard v. Adams, 10 How. 270; Fowler v. Rathbones, 12 Wall. 118.

was the chief, and deliberately chose the risk as the preferable one for the interests of all concerned, passengers aboard, shippers, and ship-owners. And although the ship be totally lost, yet if the stranding was voluntary and was designed for the common safety, and it appears that the act of stranding resulted in saving the cargo, the case is one for general average.<sup>1</sup> In other words, it may be said that property being selected for the common peril that the remainder might be saved, it is not necessary that there should even have been an intention to destroy the selected property, in order to give a claim for contribution. Extraordinary expenditure for the general benefit in landing and transporting the cargo to a place of safety may give rise to a general average.<sup>2</sup>

§ 332. *The Same Subject.* — But general average contribution can only be claimed where the sacrifice, or at least the exposure to sacrifice, has been for the common benefit; and, furthermore, where the sacrifice has accomplished the desired object.<sup>3</sup> The sacrifice must have been reasonably necessary, and it must have been voluntary and intended, — not a sacrifice by the owners' fault or by mere peril of the sea.<sup>4</sup> Thus, if goods improperly carried on deck happen to be washed overboard, there is here no general average; while the throwing of goods overboard for the common benefit — or, as merchants would say, a "jettison" — to relieve the ship in distress, cutting away the masts, and the like, all give claim for contribution, if the object in view be attained for the common benefit.<sup>5</sup> And again the community of extraordinary peril must have continued during the period of sacrifice; for, as between ship and cargo, the latter is not liable to contribute in favor of the former, after it has been completely separated from the ship, so as to leave no community of interest in the adventure.<sup>6</sup> Damages occasioned to ship or cargo by

<sup>1</sup> *The Star of Hope*, 9 Wall. 203.

<sup>2</sup> *Rose v. Bank of Australasia*, [1894] App. C. 687.

<sup>3</sup> See Bright. Fed. Dig. 67, 68; 1 Para. Shipping, 347; *Williams v. Suffolk Ins. Co.*, 3 Sumner, 510.

<sup>4</sup> See 1 Para. Shipping, 345-362,

and cases cited; Bright. Fed. Dig. 69.

<sup>5</sup> *Ib.* See *Butler v. Wildman*, 3 B. & Ald. 402.

<sup>6</sup> *McAndrews v. Thatcher*, 3 Wall. 347. And see *Hugg v. Baltimore, &c. Mining Co.*, 35 Md. 414.

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causes existing prior to and irrespective of the peril on which the claim of general average is founded should not be reckoned.<sup>1</sup>

General average contribution is enforced on the principles above set forth, in such cases as a salvage for the common benefit, or expense incurred by an extraordinary and necessary deviation of the ship; and contribution is enforced against ship, freight, and cargo.<sup>2</sup> Yet as to the interest of each and every party in the adventure, the sacrifice made or expenditure incurred must have been for the benefit of that interest; otherwise the party is not liable in this respect.<sup>3</sup>

The rule of adjustment in cases of this sort is that what is given for the general benefit of all shall be made good by the contribution of all. This principle applies whether the sacrifice is that of a part of the cargo or of the whole or a part of the ship; although controversies concerning the adjustment of a general average contribution arise most frequently in cases where some of the cargo has been thrown overboard.<sup>4</sup>

<sup>1</sup> See *Fowler v. Rathbones*, 12 Wall. 102.

<sup>2</sup> Bright. Fed. Dig. 67, 68; *Columbian Ins. Co. v. Ashby*, 13 Pet. 331.

<sup>3</sup> *Ib.*, and cases *supra*. See *Wilson v. Bank of Victoria*, L. R. 2 Q. B. 203.

<sup>4</sup> *The Star of Hope*, 9 Wall. 231 *et seq.* Where a ship has sustained injuries owing to voluntary stranding, and undergoes repairs in consequence, its contributory value is its worth before such repairs were made, — just and reasonable deduction being made in all cases for deterioration. And on this point the ship's value in the policy of insurance at the port of departure is competent *prima facie* evidence. *Ib.* In case of a jettison of goods, their value is generally estimated at their prime cost or original value; yet the place where average shall be stated is dependent to some extent upon circumstances which affect rather the practical closing of the adventure than any technical termination of the voyage; and it is

well settled that, if the cargo arrive finally at its port of destination, the value of the goods at that port shall be taken. *Barnard v. Adams*, 10 How. 270; Bright. Fed. Dig. 69. The contributory value of the freight is, according to the practice of some localities, found by deducting one third of the gross amount; an arbitrary rule, of course, but founded upon a rough estimate of the usual deduction of wages and expenses, which could not be ascertained in a given case without nice calculations. See *Humphreys v. Union Ins. Co.*, 3 Mas. 439, *per Story, J.* As to the expenses allowable, it may be generally observed that in all cases the wages and provisions of master and crew, and indeed all expenses necessarily incurred during a detention for the benefit of all concerned, should be averaged; also repairs on the ship, so far as they may be necessary to enable the voyage to be resumed; also sacrifices, by way of sales of

§ 333. **Captures, Privateering, Piracy, etc.** — Besides these topics, are others peculiar to the law of shipping, which it would be foreign to our purpose to notice at length. Thus we have a mass of decisions in the federal courts of the United States relative to captures during our belligerent years by way of prize. When two powers are at war, the seizure and detention of a ship at sea by authority of one of the belligerents, with the design of appropriating vessel and cargo, or either, makes it prize, and it becomes the lawful property of the captor after condemnation in a prize court.<sup>1</sup>

cargo, the payment of extraordinary interest, or otherwise, such as are properly made by a prudent master to raise the means for such repairs; and finally surveys, port charges, towage into the port of repair, and those extraordinary expenses in unloading and reloading a cargo which must depend greatly on the special circumstances of the case; the allowances being liberal enough, in general, to secure a complete indemnity for a prudent master's outlay in strict connection with the disaster for which contribution is claimed. *The Star of Hope*, 9 Wall. 234-237; *Abb. Shipping*, 601; 1 *Pars. Shipping*, 400; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 469; *Bright. Fed. Dig.* 69; *Barker v. Baltimore R.*, 22 Ohio St. 45. But expenses for repairs, or legal expenses, are not to be averaged in a case of collision where the vessel was culpable. *Emery v. Huntington*, 109 Mass. 431. Where the parties enter into an "average bond," they are bound by a settlement made pursuant to its terms. *Fowler v. Rathbones*, 12 Wall. 102. And a case of general average settled in a foreign port, according to the local law, may bind the parties concerned in this country, though not in accordance with our own rule. *Peters v. Warren Ins. Co.*, 14 Pet. 99. See *Fletcher v. Alexander*, L. R. 3 C. P. 375.

Such, then, is the doctrine of gen-

eral average as fully established in this country. But in England the law in this respect is not so clearly settled, and the American rule of contribution has sometimes been questioned in the courts of that country. *Fowler v. Rathbones*, 12 Wall. 102.

The English rule of average, as announced in the latest decisions of the English courts, is as follows: Where goods are jettisoned for the common good, the loss as a rule comes within general average, and must be borne proportionally "by those interested." To this rule there is an exception, viz., that deck cargo jettisoned is not entitled to general average contribution. To this exception, however, there are two exceptions, viz., that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade, and, perhaps, also from the port. *Semble*, that where by agreement with the shipper the cargo is shipped on deck, no exception is created. *Wright v. Marwood*, 7 Q. B. D. 62, commenting on former decisions. Lost freight subjected to a common average contribution. 44 L. T. N. S. 426. And see 8 Q. B. D. 653; *Machlachlan Merchant Shipping*, 3d ed. 653-693; 1 *Maude and Pollock on Merchant Shipping*, 4th ed. 425-437.

<sup>1</sup> See 1 *Kent Com.* 101; *Bright. Fed. Dig.* 688-705; 2 *Pars. Shipping*,

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Privateering and piracy constitute each a sort of robbery or forcible depredation on the high seas. The latter has long been treated as a heinous crime by the law of nations, and punishable with death; and the former is likely to become so regarded soon, if the world grows better instead of worse; for though it is said that privateering is lawful because permitted by a belligerent party, while piracy is unlawful because there is no such permission given, yet in either case, and whether there be peace or war, the plunder is that of private individuals who avail themselves of opportunities to fill their purses and satiate a reckless greed; not that of the military or naval forces of a belligerent.<sup>1</sup> Privateering may be an effective weapon to use in war against one's enemy; but only in the same sense as private spoliation, by troops in an enemy's country: it is opposed to the idea of a humane self-restraint and generous combat.

§ 334. *Jurisdiction of Courts of Admiralty.*—*Fifth*, as to the jurisdiction of courts of admiralty, to whose authority are peculiarly committed the interests of all concerned in navigation. Appropriate tribunals for the exercise of admiralty powers have long existed in Great Britain. On the subject of admiralty jurisdiction in the United States, we may briefly observe that the Federal Constitution provides that "the judicial power shall extend to all cases . . . of admiralty and maritime jurisdiction." The Judiciary Act of 1789 vests the exercise of all the civil admiralty jurisdiction in the district courts of the United States; and by subsequent statutes this jurisdiction is confirmed, if not extended; so that now this admiralty jurisdiction is fully recognized as embracing not only tide-waters, but also the great lakes and their connecting waters, and all rivers capable of being navigated by vessels which the statute recognizes as large enough to be engaged in commerce; nor limited alone to foreign or inter-

458 *et seq.* The late civil war in America (1861-65) gave occasion for an exhaustive investigation of the law of prize in the United States courts, which, as later volumes of reports show, has been nearly con-

cluded. See U. S. Rev. Stats. §§ 711, 5308 *et seq.*

<sup>1</sup> See 1 Kent Com. 96, 183; *United States v. Smith*, 5 Wheat. 153; Bright. Fed. Dig. 216, 856.

state commerce, but applicable as well to commerce between ports of a State. In these matters the Supreme Court of the United States is the appellate tribunal of last resort; and that court in its latest decisions maintains the admiralty jurisdiction of the federal courts, as against all State encroachments, with strength and vigor.<sup>1</sup>

The most important questions relating to the law of shipping are decided in the admiralty courts, and the process *in rem* which brings ship and cargo into the judicial custody has obvious advantages over common-law remedies. Yet courts of common law frequently adjudicate important controversies which grow out of the maritime contract; and wherever the admiralty and common law give the same remedies, under the law of shipping, as in most suits *in personam*, the suitor may elect his tribunal, — for the Judiciary Act saves to all suitors “the right of a common-law remedy, where the common law is competent to give it.”<sup>2</sup>

<sup>1</sup> See Const. art. 3, § 2; Bright. Fed. Dig. “Admiralty,” and cases cited; *The Eagle*, 8 Wall. 15, commenting upon *The Genesee Chief*, 12 How. 443; U. S. Rev. Stats. § 711. The term “torts” in admiralty jurisdiction embraces wrongs which are suffered in consequence of negligence and malfeasance. *Leathers v. Blessing*, 105 U. S. 626. And see *Ex parte Gordon*, 104 U. S. 515.

<sup>2</sup> Jurisdiction of a State court insisted upon in certain cases. *Hill Man. Co. v. Providence Steamship Co.*, 113 Mass. 495. Exclusive jurisdiction is not claimed by federal courts in suits *in personam* growing out of collision on inland waters. 102 U. S. 118. A valuable article on the “History of Admiralty Jurisdiction” in this country will be found in the *American Law Review* for July, 1871, where the whole subject is examined in its historical bearings to that date. As to hypothecation, bottomry, lien, and marine insurance, see appropriate chapters, *post*.

The general law of Shipping has

lost much of its former importance to American practitioners (it is hoped only temporarily), partly as a consequence of our late civil conflict, during whose progress American commerce became transferred to foreign flags. Hence no late American edition has appeared either of Abbott's famous text-book on Shipping, nor of Parsons's American treatise on that subject.

Merchant shipping and commercial law have, on the other hand, become subjects of vast importance to the English profession during the same era. A new edition of Abbott's work (the twelfth) has lately appeared in London. And among more recent English treatises upon the same subject are two of considerable merit: Maude and Pollock on Merchant Shipping (which has reached its fourth edition and is cited as authority in the English courts); and Maclachlan on Merchant Shipping (of which a third edition has appeared). Neither of these works is prepared or edited for the use of American students.



## CHAPTER II.

### MONEY.

§ 335. **Money defined; its Nature and Uses.** — The second and only remaining species of personal property of a corporeal character which claims our attention by reason of its unusual significance at the law is money. By the word “money” we may denote that medium of exchange which any people uses. With the American people, and among all civilized nations with whom we hold intercourse, this word is confined to metallic coins, except so far as a paper currency which by law or usage is permitted to circulate in the community for the like purposes of exchange may be allowed to come within the definition. The great characteristics which money possesses, and the qualities which give it so great power, are seen in two facts: that it is everywhere accepted within the public jurisdiction as the convenient standard by which may be measured the exact value of all other things; and that it is also the common and appropriate medium whereby a person may barter services, or may exchange one article with which he means to part for another which he desires to acquire. Money, in other words, is both a standard of value and a medium of exchange.

In the history of all governments what we call money has exerted an immense influence; yet very numerous and dissimilar substances have served the purposes of exchange and standard of value at different periods and among various tribes and nations. The Carthaginians used, it is said, a sort of leather bank-note; bark of the mulberry-tree cut in round pieces, and stamped with the sovereign’s mark, suffice for some of the Asiatic countries; coal, shell, and bone, together with various metals and minerals more or less precious, have served frequently as the clumsy medium for

simple and unlettered tribes ; again, as students of American history need not be reminded, the Indians who held sway while this continent was a wilderness made of their wampum, or strings of small spiral shells, a currency sufficient for all their needs. But gold and silver attained early a pre-eminence, among civilized nations, as the most convenient medium of exchange and the money standard ; and from an international standpoint, as also from local public considerations, some accepted unit of a money standard is desirable, such as the more precious and rarer of these metals the better affords.

§ 336. **The Same Subject ; Coinage of Money.** — Yet it was a long time before these precious metals became subjected to the process of coinage ; the money of the ancient Jews and others of whom we have authentic accounts being weighed, and not counted out. Possibly to the Lydians, perhaps to the people of Ægina, but more probably to some Asiatic country older than either, is the world indebted for the introduction of the coinage system, — a system whereby the sovereign gains a strong control of the metals in common circulation ; not without conferring upon his people positive benefits in return, by enabling the value of each piece to be detected at a glance, and the false to be distinguished from the true with comparative ease, as also increasing the convenience of circulation. The rise of commerce and navigation among the ancients was certainly followed speedily by the introduction and growth of coinage as an art ; and it might well be supposed that, as the demand for a circulating medium increased and broadened, those who were accustomed to using pieces of gold and silver cut into shekels, talents, and drachms, bethought themselves how they might stamp and mark each piece in such a manner that, once weighed and passed into circulation, the successive holders should feel confident of its true worth and weight without casting it into the scales anew. From Greece the system of coinage penetrated into Gaul, and from the colony of Massilia, now Marseilles, extended to Britain.<sup>1</sup>

<sup>1</sup> See Encycl. Am. "Money ;" Encycl. Britt. "Money ;" 1 Bl. Com. 276 ; Story Const. § 1111 *et seq.*

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§ 337. **Copper, etc., Coins, and their Uses.**—As a baser metal, copper was used according to weight from a very early period in Rome; nor was it until about two centuries before the Christian era that the Romans issued gold and silver coins by way of substitute for the first time. The ancient Britons had coins of imported brass, also of tin and iron, the product of their own mines; and Cæsar at the time of his invasion found them with “both lozenge and gold money; or, instead of money, rings adjusted to a certain weight.” Some base metals are found convenient in every community; the obvious purpose of their use being to avoid the necessity of making subdivisions of the more precious metals so minute as would render them of inconvenient size for passing from hand to hand when exchanges of small value were to be effected; and the same principle applying to silver for an intermediate base use as compared with gold. Copper coins are found convenient in these days for such small fractional circulation; they constitute the pence and half pence of England; and in this country copper—or more recently, a sort of amalgam of copper with nickel and other specified metals—is coined and issued from the mint to answer a like purpose, in accordance with statute and the usage of government for nearly a hundred years.<sup>1</sup>

§ 338. **Advantages of Gold and Silver for Purposes of Money.**—Some of the greatest advantages possessed by gold and silver over all the other articles which have been used to serve the purposes of money are: *first*, that these metals are sufficiently rare, the world over, to have an intrinsic value corresponding to the bulk, which constitutes a convenient medium of exchange and transportation; *second*, that, being metals, they can be melted, run into moulds, and exactly divided into fractional parts; *third*, that they can be kept for an indefinite period without deteriorating; *fourth*, that while from various causes almost all other commodities rise and decline rapidly in value and are subject to great fluctuation

<sup>1</sup> See 7 Jefferson's Works, 462; age;” Encycl. Britt. “Money;” Legal Tender Cases, *per* Clifford, J., Encycl. Am. “Money.” 12 Wall. 587; Bright. Dig. “Coin-

in price, the value of gold and silver changes only by slow degrees; *fifth*, that they do not wear out readily by the constant handling to which all money is exposed; *sixth*, that their identity is perfect, the pure gold and silver furnished by the mines of one country having the same qualities with those of another. Hence gold and silver became universal money; "not," as Turgot has observed, "in consequence of any arbitrary agreement among men, or of the intervention of any law, but by the nature and force of things."<sup>1</sup>

§ 339. **Money as a Standard of Value; its Circulation limited.** — Yet, notwithstanding the introduction of gold and silver as money, equivalents are still given for equivalents, and the standard of value is not necessarily increased or diminished thereby. We might still say that a plough was worth so much corn, or, as they expressed it in Homer's day, that a full armor cost so many oxen.<sup>2</sup> One thing is frequently exchanged for another, without the medium which gold and silver coins present, and with that mental comparison of commodity values made more obvious, which the medium reference diverted from sight. Gold and silver may be sold like other merchandise, as, for instance, where a jeweller buys it to be fashioned into plate. And as money is the means, and not the end; something for procuring food, clothes, necessities, and luxuries, not the substance to be enjoyed or consumed, it is manifest that only a limited amount is needed for circulation in any community; which amount must depend greatly upon the fluctuating population and the products to be circulated upon the separate transactions which are effected through the giving or taking of money in payment. But when a plough is said to be worth so much corn, there is an uncertainty in the minds of those who do not deal in corn; and so men agree to rate corn, ploughs, and all other articles of property according to the money standard, and we know then by arithmetical comparison what each thing is worth.

§ 340. **Money with Reference to Sale, Barter, etc.** — So, in the common language of mercantile men, the giving of money

<sup>1</sup> See *Encycl. Britt.* "Money."

<sup>2</sup> *Homer Iliad*, lib. 6, line 235.

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for a commodity is termed *buying*; and the giving of a commodity for money, *selling*. By *price*, too, we signify the value of a commodity rated in money. And in case one transfers directly goods and chattels for other goods and chattels of equal value, without the use of money, it is usually said that he makes a barter or exchange,—not a sale.<sup>1</sup>

§ 341. “Lawful Money,” as contrasted with Bullion, etc.; Legal Tender. — While the reader may understand, from what has been already said, that money is a species of corporeal property, or a *chose in possession*, with an ultimate identity of its own, he should also be reminded that the system of coinage now so prevalent among civilized nations brings about a more conventional definition of the word “money” than that already given. We do not usually apply the word to gold and silver uncoined and in the lump or mass; for that is termed *bullion*. And the word “bullion,” when considered in connection with our coinage acts, includes, apparently, even foreign coins, which must be melted up and recoined before they can circulate in this country; though with reference to the usages and laws of the country where they were coined, and where they circulate, one should still speak of them as money.<sup>2</sup>

In common language the word “money” is used as synonymous with gold and silver coins,—the coins which usually circulate in a country as the sole authorized medium of exchange. So far as concerns the United States, indeed, this has been thought by many to be the only legal definition of the word; for the Constitution provides that Congress shall have power “to coin money, regulate the value thereof, and of foreign coin;” and, again, that no State shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts; and hence it is argued that the only lawful “money” of the United States consists of our gold and silver coin. But, as we shall presently see, this is a theory which has been disputed and apparently

<sup>1</sup> See the above words in Bouv. Dict.; also, Webster and Worcester; also Vol. II. *post*, as to Sales.

<sup>2</sup> See Bouv. Dict. “Bullion.”

overthrown in a late remarkable instance.<sup>1</sup> That the word "money" was generally used in that exclusive sense until the era of our civil war will hardly be disputed, however, by any one familiar with American legislation. And so well did Congress maintain the doctrine that our gold and silver coin constituted the only lawful money of the United States, that they were careful, until recently, not to legislate that our copper and nickel coins or the coins of foreign nations should do more than "pass current," — regulating the value of the latter as the Constitution gave them power to do.<sup>2</sup> And yet our gold and silver were constantly declared to be a "legal tender" for payments, each according to its nominal value ; that is, that any one owing a debt might tender gold and silver coin of the United States for the full amount to his creditor, who was legally bound to receive it in payment and satisfaction.<sup>3</sup>

§ 342. **Distinction between Corporeal and Incorporeal Personality with Respect to Money.** — This "legal-tender" aspect of money, it may be added, which is an important one in connection with its use as a medium of exchange, becomes in practice the convenient test for distinguishing money from that which passes about as though it were money ; a bank check or note, for instance, which is often taken, yet may be refused, in payment of a debt, from the gold or silver coin bearing the stamp of the mint, which government compels to be received in payment whether the creditor will or no. And herein we consider the true distinction lies between the thing corporeal and the thing incorporeal, as concerns personal property ; for if notes are lawfully issued, under authority of the Constitution, to pass as a legal tender for the payment of debts at their nominal value, they become "money ;" and being money, or that thing which extinguishes all debts as between individuals, and not a debt, each note for itself, nor the evidence of a debt, to be extinguished afterwards, in their dealings, by the payment of gold

<sup>1</sup> See Const. U. S. art. 1, §§ 8, 10.  
And see Legal Tender Cases, 12  
Wall. 457.

<sup>2</sup> See Bright. Dig. U. S. Laws,  
"Coinage ;" ib. Suppl.

<sup>3</sup> Ib. And see Bouv. Dict. "Money."

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and silver, the legal-tender notes are still to be considered in transactions between individuals as corporeal property ; or, as our law-writers would generally express it, *choses in possession*, and not *choses in action*.<sup>1</sup>

§ 343. **Coinage by Government ; English Money.** — The power to coin money and regulate its value has usually been exercised by government, and not by individuals. The Emperor Justinian lent his sanction to the exercise of this power ; and among modern nations the right to do so is as little questioned as the expediency. Yet we read that during the reign of the early kings of England, and for some time after the Norman conquest, not only was the right to coin money exercised by bishops and abbots, but almost every baron issued money by his own authority, until the coinage was brought to utter confusion. Henry II. in 1154, and after him Henry III. and the Edwards, brought the coinage system of England more under their sovereign control, and laws were made and orders issued from time to time to keep out foreign coins and for the purpose of recoinage and even debasing, for selfish purposes, the common money of the realm. From the period of the Saxon heptarchy, the standard money of England has consisted of pounds, shillings, and pence ; and at first the pound consisted of an actual pound of silver, each pound being coined into two hundred and forty pennies. The term “sterling” was used at a later period to signify that this was the standard money of England. And, still later, the weight of the pound was diminished by successive kings.<sup>2</sup> At the present day the words “pound” and “sovereign” are used as synonymous terms in that country, and the value of the pound sterling is rated here by various acts of Congress.<sup>3</sup>

<sup>1</sup> The full expression of such notes is to make them a legal tender “in payment of all debts, public and private, within the United States.” But public taxes, which are in the nature of an exaction under the law, requiring an involuntary contribution, are not “debts” in this sense.

*Hagar v. Reclamation District*, 111 U. S. 701, 706. See § 345.

<sup>2</sup> See *Encycl. Am. and Encycl. Britt.* “Money,” with authorities cited.

<sup>3</sup> *Ib.* See Act July 27, 1842, § 1 ; 5 Stat. 496. Act of 1842 rated the pound sterling as equal to four dollars

§ 344. **The Same Subject; American Money.**—The dollar is the money unit in the United States, and so has been ever since its first establishment under the Confederation by resolution of Congress, July 6, 1785, when it was further resolved that the smallest coin (the half-cent) be of copper, of which two hundred should pass for a dollar; and that the several pieces should increase in a decimal ratio. Up to this time Americans had adopted no money standard of their own, but as colonists had followed that of the mother country. On the 8th of August, 1786, Congress further established the standard for gold and silver; making only a silver dollar at this time, but rating, in the decimal ratios of ten, mills, cents, dimes, and dollars, as we still reckon them; and authorizing two gold pieces to be coined, the eagle and half-eagle, the former being equivalent to ten dollars.<sup>1</sup> The Constitution of the United States, adopted soon after, took from the several States, by force of the articles to which we have already alluded, the power to coin money, and re-vested it exclusively in the Congress of the United States; and accordingly laws were once more enacted, regulating the value of the several coins,—to much the same effect as before. After the establishment of a United States mint, under the act of April 2, 1792, the coinage of dollars and the establishment of a decimal system first commenced in this country,—in 1794, as it is said.<sup>2</sup> And while for centuries “the image and superscription” of the sovereign had appeared stamped upon the gold and silver coin of most nations, our government, born of the people and for the people, took at once its own choice emblems of liberty and the eagle; for we acknowledge neither prince, nor potentate, nor warrior as worthy of giving significance and currency to the coined money of the United States.

With the changing wants and increasing demands of trade and population, as well as the discovery of new mines, came

and eighty cents. Act of 1873 computes it at four dollars and eighty-six cents and six and one-half mills. See U. S. Rev. Stats. § 3565.

<sup>1</sup> See Articles Confed. IX. conferring power on Congress.

<sup>2</sup> See Bright. Dig. “Coinage,” *passim*; also, Bouv. Dict. “Dollar.”



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modifications of our coinage laws; such as the establishment of branches of the United States mint, and assay offices, and modifications of law concerning the standard weight and value of the dollar, the comparative value of foreign coins, and the kinds and relative proportion of pieces to be sent out for general circulation. The Act of March 3, 1849, authorized the coinage of gold dollars, conformably to the standard for gold coins previously existing; and the silver dollar was for the time driven out of circulation in this country, by the passage of the Act of Feb. 21, 1853, which reduced the weight of the half-dollar and smaller coins without changing that of the larger denomination: whereby two silver half-dollars purchased as much as a silver dollar, though containing some twenty-eight grains less of the precious metal. Such was the lawful money of the United States as regulated by Congress up to the year 1862.<sup>1</sup>

§ 345. "**Legal Tender**" Notes, whether **American Money**. — In April, 1861, began that memorable civil conflict which lasted for more than four years and resulted in the final downfall of human slavery in the United States. The necessities of the nation during the period of that perilous struggle drove our government into strange financial experiments, and developed new constitutional doctrines touching the money powers of Congress which have ever since agitated the courts and affected the executive policy. With the first touch of war, gold and silver coin melted away like snow before the breath of spring. For purposes of ordinary circulation the paper bills of local banks redeemable in metallic money had been found a convenient currency, because so easily carried about in large amounts, unlike the coin which they represented; and these banks suspending

<sup>1</sup> *Ib.* See, as to receiving Spanish and Mexican dollars and fractions of a dollar, Act 21 Feb. 1857. And see, for later modifications of the coinage law, U. S. Rev. Stats. §§ 3563–3568. The policy in Congress of later years appears to have been to favor the restoration of a bi-metallic currency; though, as to silver dol-

lars, thus far with scarcely any practical success. See U. S. Rev. Stats. § 3513 *et seq.*; Joint Res. July 22, 1876; 19 Stat. L. 215; Act Feb. 28, 1878 (20 Stat. L. 25). See also silver purchase act of 1890 repealed by Act November 1, 1893 (28 Stat. L. 4).

specie payments, the bills still floated about in a depreciated condition. Postage-stamps, vouchers, private checks and counters at once came into use for small change in place of the silver half-dollar pieces, quarters, dimes, and half-dimes. Gold and silver rose in the scale high above par. All this was new to us of this generation, yet it was the old story of past revolutionary struggles. For there are certain truths which are well established in political economy: namely, that only a limited amount of money is needed for circulation in a community, and that any forced excess results in depreciation, and leads towards utter worthlessness; that where there is paper money redeemable on demand, the bills sent out in excess of the immediate wants of circulation return to the counters whence they issued, whereby an equilibrium is preserved in the community; that the moment paper circulating in excess of the general demand is made irredeemable, it drives out the gold and silver which it represented, since irredeemable paper finds no circulation outside of the nation which issues it or permits its issue, while gold and silver, the universal medium of exchange, have the whole civilized world wherein to find a level, and may be melted up, exported, and recoinied at pleasure; that where a paper dollar and a gold dollar are found representing the unit of value together, but the former is thus depreciated, while the latter maintains its value, comparatively speaking, the less in value supplants in local circulation the greater, and the gold dollar sells for its equivalent in paper, or, since the latter remains the unit of value, is said to rise above par.

Under circumstances like these, and goaded by the immediate needs of a war which was draining the national resources and impoverishing the whole country, the nation resorted, for the third time in the history of this country under the Constitution, to an internal system in addition to that of the customs for procuring an immediate revenue, besides borrowing sums on the credit of the United States, as largely and as rapidly as possible. And, what is most pertinent to our present investigation, Congress, urged by the financial advisers of the nation, took advantage of the

existing state of the currency to put upon the market notes of the nation designed to serve as the circulating medium of the people, to be in effect lawful money; thereby adding immensely to the public resources, while in some degree alleviating the distress which prevailed in business circles. The first of these acts of Congress—since known as the “Legal Tender Acts”—was that of Feb. 25, 1862, which authorized the issue of one hundred and fifty million dollars of such notes; and other acts of like import speedily followed, dated July 11, 1862, and March 3, 1863, and increasing the volume of legal-tender currency to the immense sum of four hundred and fifty millions; not to speak of interest-bearing notes which soon came to be authorized besides. These notes were made by statute law receivable in payment of all loans made to the United States, and of all duties, debts, and demands due to the United States except duties on imports and interest, and of all claims and demands against the United States substantially except for interest on its coin-bearing loans; and it was added that they should also “be lawful money and a legal tender in payment of all debts, public and private, within the United States,”<sup>1</sup> with the exceptions, as just stated, of duties on imports and interest, which, as before, together with the interest and principal of new coin-bearing loans, continued to be payable in gold and silver coin. Such is the new money of the United States, which was destined to become historical as “legal tenders” or “greenbacks;” and whose creation led to those heated controversies in the courts over the constitutional powers of Congress which culminated in the summer of 1871 in the memorable decision of the Supreme Court of the United States, in what are well known as the *Legal Tender Cases*.<sup>2</sup>

<sup>1</sup> See § 342, note.

<sup>2</sup> See *Legal Tender Cases*, 12 Wall. 457, overruling *Hepburn v. Griswold*, 8 Wall. 603. The legal result thus arrived at, and what we may call, if permanently sustained, the later American doctrine, is that there are

two kinds of lawful money of the United States, either or both of which may be permitted to pass current under the Constitution; the one consisting of coined money, the other of legal-tender notes. And since, wherever both circulate at the same time,

And to take the place of postage and revenue stamps and the fractional "postage currency," the issue of fractional

the latter kind is depreciated as compared with the former, there must be a hardship under the operation of this doctrine, as seen in the fact that one who loans so many dollars in coined money prior to the passage of a legal-tender act is compelled to take his pay after its passage, and while it remains in force, in depreciated paper, which, though nominally for the same number of dollars, is actually for a much smaller amount in purchasable value than though expressed to be in coin. Yet such has been the current of decision in a large number of the State courts during the continuance of the rebellion and since its close, hardship or no hardship; the almost uniform preference being to uphold the constitutionality of the Legal Tender Acts, whatever the circumstances at issue; though patriotism and an inflexible purpose of sustaining the public credit at all hazards doubtless influenced these results in a remarkable degree. And while a multitude of precedents may be gathered from the local reports for the ten years immediately succeeding the passage of the first of these "Legal Tender Acts," to support the doctrine that promises to pay, whether made before or after February, 1862, can be discharged in paper dollars for the nominal amount promised, — and this, too, even though the contract were to pay in "coin of the United States," we apprehend that all these cases are to be considered of somewhat temporary importance, and liable to be modified, because of the later decisions of the Supreme Court of the United States, the final arbiter in constitutional questions of this sort. See *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400; *Schollenberger v. Brinton*, 52 Penn. St. 9, 100; *Latham v. United States*, 1 C. Cl.

149; *George v. Concord*, 45 N. H. 484; *Carpenter v. Northfield Bank*, 39 Vt. 46. The court here less positively sustains the constitutional powers claimed by Congress in the matter, and certainly gives to individuals a more liberal opportunity for expressing choice in their private transactions, as to the kind of lawful money in which payments shall be made and received, — whether in the stable metallic coins of gold and silver, or these fluctuating and uncertain legal-tender notes.

The doctrine of the American courts, as thus expounded by the tribunal of last resort, we conceive to be suitably expressed in these propositions: *first*, that under ordinary circumstances the only "lawful money of the United States" recognized by the Constitution is gold and silver coin; *second*, that amid extraordinary circumstances of public peril, and by virtue of what are called war powers under the Constitution, Congress may issue paper notes to serve as money and a legal tender in payment of all debts whether contracted before or after the passage of the act authorizing such issue, — these notes to constitute a sort of war currency, and to be retired by government as soon as may be after the emergency has passed; *third*, that legal-tender notes having been issued under such circumstances, a contract for the payment of money generally may be discharged in these notes, instead of in gold and silver coin, at the debtor's option; but *fourth*, that where a contract is expressly made payable for so many dollars "in specie," or in "gold and silver coin," or other like expressions are used, clearly indicating an intention that paper dollars shall not be acceptable in payment of the obliga-

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notes was regularly commenced under authority of law, and continued many years after for the purpose of petty circulation, — not, however, as “legal tenders,” strictly speaking.<sup>1</sup>

§ 346. Effect of “Confederate” Currency. — Other money questions growing out of the late rebellion affect the validity of contracts payable in notes of the insurgent government.

tion incurred, payment must be made accordingly in gold and silver dollars; *fifth*, that contracts contemplating the purchase of gold or silver as a commodity are also to be so satisfied, and not in legal-tender notes at a nominal rate; *sixth*, that to avoid ambiguity and prevent a failure of justice, judgments may be entered for the payment of coined dollars, whenever that kind of money is specifically designated in the contracts upon which suit is brought. See Legal Tender Cases, 12 Wall. 457, *passim*, with all opinions rendered; *Trebilcock v. Wilson*, *ib.* 687; *Bronson v. Rhodes*, 7 Wall. 229. And see *Bank of the State v. Burton*, 27 Ind. 426; *Essex Co. v. Pacific Mills*, 14 Allen, 389; *Christ Church Hospital v. Fuechsel*, 54 Penn. St. 71; *Hinneman v. Rosenback*, 39 N. Y. 98. And, we may add that, while the Supreme Court of the United States pronounced for the last three of these propositions with something approaching unanimity, and that, too, at a time when public opinion favored the issue of irredeemable paper notes more than it is likely to again during the present century, the judges were so completely at variance on the second and third propositions that in 1870 there was found a bare majority to repudiate the legal-tender doctrine *in toto*, whose decision was in turn reversed by another bare majority, one year later; the law officers of government pressing new test cases forward, and important changes having meantime taken place in the composition of the bench. See Legal Tender Cases, 11 Wall.

682; 12 *ib.* 457; overruling *Hepburn v. Griswold*, 8 Wall. 603.

This chapter was first written during the era succeeding the civil conflict, while specie payments were suspended, and the second of the “legal tender” decisions above noted was supposed to lend the government a moral support in such general suspension. Under a later act of Congress approved Jan. 14, 1875, specie payments were practically resumed in the United States, the act taking effect Jan. 1, 1879. Various State decisions meanwhile were rendered after 1870, conforming to the later decision of the Supreme Court of the United States above referred to. *Kellogg v. Page*, 44 Vt. 356. The Supreme Court, by a majority, reaffirmed its decision as to the constitutionality of the legal-tender acts in various later instances before 1875. *Bigler v. Waller*, 14 Wall. 297; *Railroad Co. v. Johnson*, 15 Wall. 195. But once more (1884) by a decision from which only one of the justices dissented, and in a test case brought upon a legal tender note reissued after the war, the Supreme Court abandoned this whole financial issue to the omnipotent discretion of Congress; declaring that Congress has, in times of either peace or war, the constitutional power to make the notes of the United States treasury a legal tender. *Juilliard v. Greenman*, 110 U. S. 421.

<sup>1</sup> See Act March 3, 1863, § 4; Bright. Fed. Dig. “Currency.” And see U. S. Rev. Stats. (1878) §§ 3571-3583, for the currency acts.

While there is no doubt that contracts in aid of rebellion against the United States are to be deemed utterly void, and that the paper money issued by insurgent authorities is a nullity, yet the settled doctrine is that such a currency as was issued by the Confederate government, while it held sway, must be regarded as a currency imposed on the community under Confederate control. And the same rule would hold true if its own currency were issued by a foreign government temporarily occupying part of the territory of the United States.<sup>1</sup> Hence, an ordinary contract, made not for the purpose of aiding rebellion, but in the usual course of business, and between parties subjected to the Confederate sway, and payable in Confederate "dollars," is binding to the extent of the actual value of these dollars, at the time and place of the contract, in lawful money of the United States.<sup>2</sup> Yet payment in Confederate currency having been made and accepted in good faith as between individuals of an insurgent State, the debt was discharged.<sup>3</sup>

But it is also decided that, after the rebellion broke out, debtors in the rebellious States had no right to discharge debts owing their creditors in the loyal States, in any other currency than the legal currency of the United States.<sup>4</sup> Nor is the claim that payment in Confederate currency was intended, to be set up in doubtful cases.<sup>5</sup>

§ 347. **Specie and Currency distinguished.** — "Specie" and "currency" are words now in familiar use, and deserve a passing distinction. The term "in specie," as applied to money, has acquired, among business men in this country, the signification that the amount payable shall be in so many gold or silver dollars of the coinage of the United States. On the other hand, commercial usage generally applies the words "in currency" to denote that the note is payable in

<sup>1</sup> *Thorington v. Smith*, 8 Wall. 1, 11. See as to "bankable currency" in a Confederate contract, *Rives v. Duke*, 105 U. S. 132.

<sup>2</sup> *Ib.*; 96 U. S. 580; 115 U. S. 568. <sup>3</sup> *Cook v. Lillo*, 103 U. S. 792. See

<sup>4</sup> *Glasgow v. Lipse*, 117 U. S. 327; 94 U. S. 434. as to Virginia coupon cases (coupons receivable for the State taxes), 114

<sup>5</sup> *Fretz v. Stover*, 22 Wall. 198. U. S. 270, 317; 135 U. S. 664.

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paper notes, and not in metallic coin, if the two kinds of money are in circulation.<sup>1</sup> Specie, in other words, is restrictive in its application; while currency has a very broad signification when used with reference to money, and includes the aggregate of coin, bills, and notes in circulation as money without qualification. We speak of metallic currency, paper currency, and a mixed currency; but specie dollars are gold and silver dollars and nothing else.

§ 348. **Counterfeiting, Forgery, and Kindred Crimes.**— Governments having, as we have seen, long asserted the prerogative of regulating and controlling the coinage,<sup>2</sup> counterfeiting the coin is usually treated by the common law of England as an offence against the king or government. It was formerly punished as treason, though now it is only felony. But perhaps the better opinion is, that counterfeiting is a species of the crime of forgery, to which it is at all events quite analogous; and forgery rests on the broad foundation of an attempt to defraud individuals, and is punishable accordingly.<sup>3</sup> The Constitution of the United States gives Congress the power "to provide for the punishment of counterfeiting the securities and current coin of the United States."<sup>4</sup> Congress has accordingly, from time to time, enacted laws for punishing crimes against the coinage.<sup>5</sup> And, besides the offence of making counterfeit money in imitation of that of the United States, there are the kindred offences of uttering or passing counterfeit money, and of debasing the coinage; counterfeiting foreign money being also punishable: all of which matters Congress aims to control by legislation. And with the issue of legal-tender notes, and other paper currency, and the vast increase of our public debt, this sort of legislation advances still further; and bonds, coupons,

<sup>1</sup> See Field, J., in *Trebilcock v. Wilson*, 12 Wall. 695; also, Worcester's and Webster's Dict. "Currency," "Specie."

<sup>2</sup> *Supra*, § 343.

<sup>3</sup> See 1 Bish. Crim. Law, 4th ed., § 930; 2 ib. § 260 *et seq.*; 4 Bl. Com. 97; 1 Russ. Crimes, Grea. ed. 54 *et seq.*

<sup>4</sup> Const. U. S. art. 1, § 8.

<sup>5</sup> Thus, by act of June 8, 1864, the penalty is by fine or imprisonment, or both, at the discretion of the court, according to the aggravation of the offence. See Bright. Fed. Dig. "Crimes;" Act June 8, 1864, § 1.

national currency, United States notes, treasury notes, fractional notes, checks for money issued by officers of the United States, certificates of indebtedness, certificates of deposit, stamps, and other representatives of value of whatever denomination issued by any Act of Congress, are all made punishable by law, the crime of counterfeiting thus still more closely assimilating to that of forgery.<sup>1</sup>

§ 349. **Bills of Credit; Prohibition upon States.** — Since the Constitution prohibits States from coining money, emitting bills of credit, and making anything but gold and silver a tender in payment of debts, while conferring upon Congress the vast money powers which we have just considered, the exclusive regulation of the currency is in the federal government.<sup>2</sup> But such was not the case prior to 1789. The American colonies being almost destitute of coined money from the earliest period, and having the balance of trade constantly against them in their transactions with Europe, were early driven to the issue of paper money for home circulation. During the Revolutionary war, the several States vied with the Continental Congress in furnishing an irredeemable paper medium. So terrible were the conse-

<sup>1</sup> See *ib.*, Act June 30, 1864, § 13; Act March 3, 1863, § 8; *United States v. Howell*, 11 Wall. 432.

The words "false, forged, and counterfeit," in a statute of this sort, will receive a fair construction in the courts; and the use of such words implies that the coin or bill issued was something purporting to be, or in the similitude of, the lawful money of the government, and not in reality genuine or valid. *United States v. Howell*, 11 Wall. 432. And see U. S. Rev. Stats. §§ 5413-5437, 5457-5462. Nor does it appear that the constitutional grant of power to provide "for the punishment of counterfeiting" admits of narrowing down so as to defeat its just intent; for though the offence of "passing" counterfeit coin is not clearly embraced within the words of the Constitution, yet in a

number of statutes and decisions, the right of Congress to punish this offence is assumed. See Bright. Dig. "Crimes;" Bright. Fed. Dig. "Crimes;" Biah. Crim. Law, § 268 *et seq.* But see *Fox v. State of Ohio*, 5 How. 410, *passim*. And it is clearly established that Congress may provide for the punishment of bringing into the United States, from abroad, false, forged, and counterfeit coin, made in the similitude of federal money; and for the punishment of uttering and passing the same. *United States v. Marigold*, 9 How. 560. The different States frequently enact laws, likewise, punishing the offence of circulating counterfeit coin of the United States; and such statutes are not repugnant to the Constitution. *Fox v. State of Ohio*, 5 How. 410.

<sup>2</sup> See Const. art. 1, §§ 8, 10.



quences, that the framers of our present Constitution, still struggling with the continental currency, were zealous in the effort to guard against like calamities for the future; and hence this prohibition to the States. Bills of credit, then, cannot be issued by a State, under the Constitution of the United States, in force since 1789.

But what are "bills of credit" within the prohibition of the Constitution? To constitute such a bill, it must be issued by a State, on the faith of the State, and be designed to circulate as money in the ordinary uses of business.<sup>1</sup> And thus it has been held that certificates issued by a State in small sums, receivable in payment of State, county, and town dues, are bills of credit and so prohibited.<sup>2</sup> But where a bank was incorporated by a State, was managed by directors under its charter, had a capital stock actually paid in and liable for its debts, and was subject to suit for non-payment, the Supreme Court of the United States refused to treat its bills as "bills of credit" issued by the State, though the State owned the entire stock, the legislature elected the directors, and the faith of the State was pledged for the redemption of the bills, these being made receivable in payment of all public dues.<sup>3</sup> It has since been suggested that the principal ground for distinguishing these last bills from "bills of credit" as emitted by a State was, that they rested not on the credit of the State, but on that of a corporation as derived from its capital stock;<sup>4</sup> and perhaps that decision went to the very verge of constitutional limitations.

§ 350. **National Banks and their Currency.** — To provide for possible exigencies of the government, besides furnishing to the people a convenient circulating medium usually redeemable, national banks have sometimes been deemed a public necessity. In the time of William and Mary was

<sup>1</sup> *Briscoe v. Bank of Kentucky*, 11 Pet. 311.

<sup>2</sup> *Craig v. Missouri*, 4 Pet. 410.

<sup>3</sup> *Darrington v. Bank of Alabama*, 13 How. 12. See *Woodruff v. Trapnall*, 10 How. 190.

<sup>4</sup> See *Curtis, J.*, in *Curran v. State*

of Arkansas, 15 How. 318. Coupons issued by a State, payable at a day certain, and receivable after maturity by the State for taxes and debts, are not bills of credit, if not used nor intended to circulate as money. *Poin-dexter v. Greenhow*, 114 U. S. 270.

established the Bank of England, by whose operations wars are carried on and the sinews of government supplied. The notes of this bank have circulated throughout Great Britain, in times of financial pressure, to much the same effect as a legal tender currency, even where they were not made a legal tender by law; and since the resumption of specie payments in that country after the terrible wars with Napoleon, the act rechartering the Bank of England has made its notes a legal tender.<sup>1</sup> A bank with similar powers was organized in this country for like purposes under an act of Congress passed soon after the adoption of the Constitution. The Bank of the United States—for such was its name—was regarded then and for many years after with an almost superstitious veneration, as part of the indispensable financial machinery of government. It contributed materially in supplying the government with money, and gave to the people a uniform currency. But a corporation wielding powers so vast could not be popular; and its charter was not renewed. Hence, in the war with Great Britain in 1812, the nation became sadly straitened. Large loans found no purchasers on favorable terms. The Secretary of the Treasury was forced to issue treasury notes in large quantities, which ran for short periods, and were made a legal tender for all debts due the United States,—not, however, like the recent legal tenders, so as to affect the contracts of individuals with one another. Soon after the return of peace these notes were called in, for the finances of the country at once began to mend. And now the United States Bank, with features substantially as before, was once more put into operation, in 1816, as a remedy against those ills from which the people had just escaped. Part of the capital was subscribed by the Government, which was also represented in the Board of Directors. To furnish a redeemable currency, to supply the public loans, to hold the national deposits,—these were its great objects. This bank shot out its branches into the several States. The validity of its charter, and the constitu-

<sup>1</sup> See *Encycl. Britt.* "Money;" Bradley, J., in *Legal Tender Cases*, 12 Wall. 568, 569.

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tional power of Congress to establish such an institution, received the final sanction of the Supreme Court.<sup>1</sup> Notwithstanding all this, the United States Bank soon fell. Its monopoly features rendered it odious. The same opposition arose as before. President Jackson gave the corporation its death-blow; its charter failed of renewal; and bank and State were once more divorced.

The sub-treasury system to which the nation gradually drifted, after some futile, but nearly successful, attempts to re-establish something like the old United States Bank, has stood ever since, though much of its distinctiveness is now disappearing. It was the only fiscal agent of the United States during the war with Mexico,—the third critical period of our national finances. Banks and banking companies organized under State charters, gradually assumed the important trust of furnishing to the country a paper-money circulation, their notes being redeemable, of course, in specie on demand at their respective counters. But with so many States, so many systems, and so many banks,—good, bad, and indifferent,—a uniform and stable paper currency was wanting; and when the war of the rebellion commenced, in 1861, these banks suspended specie payments at once.<sup>2</sup>

The experiment of the federal government with its legal tenders opened the way, under such favoring circumstances, for a renewed effort to give to this broad continent a stable, permanent, and uniform currency; in other words to re-establish a sort of United States Bank, shorn of its corporate powers, and now become a cluster of local institutions capable of creation on liberal terms and without essential favoritism. The first of these National Banking Acts is that of Feb. 25, 1863, though there is later legislation of importance on the subject.<sup>3</sup> The details of the system are under superintendence of an officer of government, who looks after the banks and issues the bills, and who is designated as the

<sup>1</sup> See *McCulloch v. Maryland*, 4 Wheat. 316. See 1-4 Schouler's United States, *passim*.

<sup>2</sup> 5 Schouler's United States, *passim*.

<sup>3</sup> See also U. S. Rev. Stats. tit. lxii.; *ib. Suppl.* (1874-1881), 58, 123, 217.

Comptroller of the Currency. Banking associations are organized to continue in operation, the capital stock of each consisting partly of United States securities which are deposited at the treasury, thus constituting a trust fund to secure its circulation; whereupon currency notes are issued for a certain amount by the Comptroller to be put into circulation in the name of the bank. The number of banks to be organized, and the amount of circulating notes to be issued, are regulated by Congress. These notes are made receivable at par, except for duties on imports, interest on bonds, and redemption of the currency. National banks may also be designated as depositaries of public moneys.<sup>1</sup>

The number of these institutions now in active operation is large, and their aggregate circulation is to the full extent allowed by law. Many of them are simply old banks reorganized and bearing the same general name as before, the bills issued formerly under the State charters having been taxed by Congress out of existence. It will be seen that the new banking system is built upon the national debt; for the grand financial policy of the government at the time the act passed was to pour the banking capital of the country in time of war into the federal exchequer.<sup>2</sup>

§ 351. **Bank Notes, etc.; How far a Legal Tender.**—So much then for what is, strictly and properly speaking, lawful money. Yet other things, besides coin of the government and bills which are made a legal tender by constitutional authority, are frequently considered “money,” to use a popular rather than a technical expression. Thus the current bills of a bank are often spoken of as “money,” because, though redeemable on demand, men pay them out or take

<sup>1</sup> The equalization of circulation among the States is repealed, the aggregate circulation is left unlimited, and liberal provision is made for organizing new national banks under the act Jan. 14, 1875, which provides for resuming specie payments.

<sup>2</sup> A number of decisions relative to the National Banking Acts, which it would be foreign to our purpose to

set forth, may be found in Bright. Fed. Dig. “Banks,” 96. And see *Lionberger v. Rouse*, 9 Wall. 468; *Kennedy v. Gibson*, 8 Wall. 498; *Bank v. Lanier*, 11 Wall. 369. As the volume of our national war debt shrinks in size, the question of a safe substitute security for a national bank currency to rest upon becomes (1896) a pressing one.

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them as though they were gold and silver; the great mass of the community never thinking whether they are redeemable or not, but knowing that they pass current in ordinary times for the same amount in gold and silver coin, besides being more portable. They are so far treated as money that the holder of one stolen from a bank is not obliged to show how he came by it in order to recover upon it.<sup>1</sup> But bank-notes are not, strictly speaking, money, and cannot be in the true sense a legal tender.<sup>2</sup> Nor can bank-bills be brought into court as cash if seasonably objected to.<sup>3</sup> And bills, notes, or checks, not current at their par value nor redeemable on presentation, are not a good tender, whether objected to at the time of payment or not.<sup>4</sup>

Yet current bills which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered, may become by a corresponding acceptance a good tender.<sup>5</sup> So, for that matter, upon mutual intent, may be a check, or even foreign money.<sup>6</sup> For the principle here applied is that the creditor elected to receive the thing paid over as money, and that such was the mutual understanding at the time of payment. Accordingly we find that the "money count" in pleading—so called because founded on an express or implied promise to pay money in consideration of a pre-existing debt—may be supported under such circumstances, though no "money" was received by defendant, but only bank-notes or other property which he received as money.<sup>7</sup> And it may be added

<sup>1</sup> See *Wyer v. Dorchester, &c. Bank*, 11 Cush. 51. But see *De la Chaumette v. Bank of England*, 9 B. & C. 208. This is a privilege which applies to negotiable instruments generally. See vol. ii. part iv. c. 1.

<sup>2</sup> *Hallowell Bank v. Howard*, 13 Mass. 234; *Pickard v. Bankes*, 13 East, 20; *Morse Banks*, 397.

<sup>3</sup> *Hallowell Bank v. Howard*, 13 Mass. 234.

<sup>4</sup> *Ward v. Smith*, 7 Wall. 447;

*Ontario Bank v. Lightbody*, 13 Wend. 105.

<sup>5</sup> *Ib.*; *Pickard v. Bankes*, 13 East, 20.

<sup>6</sup> *Spratt v. Hobhouse*, 4 Bing. 173; *National Bank v. Levy*, 17 R. I. 746; *Ehrensperger v. Anderson*, 3 Ex. 148; *Taylor v. Wilson*, 11 Met. 44. See § 367.

<sup>7</sup> See Bouv. Dict. "Money had and received;" 1 Chitty Pl. 351 *et seq.*

that the words "bank-bill" and "bank-note" are often used indifferently and with the same meaning.<sup>1</sup>

§ 352. "**Money,**" "**Cash,**" etc., in **Testamentary Trusts, and Colloquial Use.** — In cases arising upon the construction of a will (where a testator's intent is the pole-star for judicial guidance), we often find considerable latitude allowed in determining what shall pass as a bequest of "money." Under a bequest of "all the money which shall be left at my decease," courts have gone so far as to decide, upon a general construction of the whole will, that promissory notes and other securities for the payment of money pass.<sup>2</sup> And some have said that money is a genus that comprehends two species, — ready money and money due.<sup>3</sup> Certainly current bank-notes on hand and money balances due at the bank, would frequently be treated as money, out of regard to the testator's intent.<sup>4</sup> "Cash," and "ready money" or "money in hand," are terms which require, however, a stricter interpretation.<sup>5</sup> Where a rule is relaxed out of regard to the intent of a testator (who cannot be supposed to know, ordinarily, just how much money will be on his person in coin, rather than in a bank, when he dies), we cannot well construct a definition from the precedents; and "money," as corporeal rather than incorporeal property, as a *chose in pos-*

<sup>1</sup> *Eastman v. Commonwealth*, 4 Gray, 416.

<sup>2</sup> *Morton v. Perry*, 1 Met. 446.

<sup>3</sup> See *Shelmer's Case*, Gilb. Eq. 200.

<sup>4</sup> *Mann v. Mann*, 1 Johns. Ch. 231; *Dabney v. Cottrell*, 9 Gratt. 572.

<sup>5</sup> See *Beales v. Crisford*, 13 Sim. 592. Notwithstanding the varying decisions of the courts as to what passes under a bequest of "money," they are certainly less inclined to include promissory notes, bonds, mortgages, and other securities, than current bank-bills and deposits at a bank. See cases cited in 2 Redf. Wills, 2d ed. 103 *et seq.* Not even public stocks can be strictly deemed

money. *Gosden v. Dotterill*, 1 My. & K. 56. But in an English case, Bank of England notes were lately included, with guineas and sovereigns, while country bank-notes were treated as standing on the same footing with promissory notes, and so excluded. *Brooke v. Turner*, 7 Sim. 671. We have already noted that Bank of England bills have served in England as a legal tender. *Supra*, § 350.

Under a statute which permits of sales for "cash" only, ready money transactions are intended and sales on credit are excluded. 136 U. S. 256. Such, too, is the colloquial distinction.

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*session* rather than a *chose in action*, as a lawful tender for debts, a medium of exchange and a standard of value, rather than something current and redeemable, is quite different from that vague ideal thing "money" which lurks in a dying man's brain and so too occurs in colloquial use, as something almost synonymous with personal property and comprehensive enough to embrace the general residue of one's personal estate.<sup>1</sup>

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CHAPTER III.

DEBTS IN GENERAL.

§ 353. **Chattels to be hereafter considered are Incorporeal.** — From corporeal things personal, or *choses in possession*, we now come to incorporeal things personal or *choses in action*; and having considered sufficiently those kinds of property which one can touch and see, whose enumeration is needless since their legal incidents are for the most part the same, we shall for the remainder of the present volume devote ourselves to property of that description which cannot, strictly speaking, be seen, touched, or handled, and which has only an ideal existence. This latter kind gives rise to various

<sup>1</sup> See 1 Jarm. Wills, 1861, 730-737, and cases cited; Legg v. Asgill, cited 4 Russ. 369; 2 Redf. Wills, 2d ed., 103 *et seq.*

Once more: since bank-bills are carried about on one's person as cash, and circulate in a community on the peculiar footing of a currency, — redeemable or irredeemable, yet seldom redeemed on the holder's demand, but rather taken by one individual to be paid over to another, — we cannot doubt (though the question was probably never raised), that when a wife dies leaving a husband surviving her, the common law gives him, absolutely and at once, what-

ever bank-bills she leaves, as well as her "lawful money," strictly so called. Yet, from want of a clear conception of the terms to be used in personal property, it has been usual to say that the wife's *choses in possession* go absolutely to the husband, while her *choses in action* do not, unless he reduced them into possession during her lifetime. See Schoul. Hus. & Wife, §§ 150, 151. That, in our opinion, mere current bills are incorporeal, or *choses in action*, while "lawful money" is a *chose in possession*, we have already sufficiently intimated in this chapter.

peculiar species which require legal distinction. That our treatment of the subject may be logical and progressive, we shall first speak of that simplest species of an incorporeal chattel which is known as a debt.

§ 354. **Simple Chattel Incorporeal; Debt defined, etc.** — A *debt*, as one readily gathers from its Latin derivation, is something owed. The person to whom it is owed is the creditor: the person owing it is the debtor. "The legal acceptance of debt is," says Blackstone, "a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific and does not depend upon any subsequent valuation to settle it."<sup>1</sup> But perhaps the words "certain and express" here used are rather too strong; for the creation of a debt may be proved by any circumstances which raise an agreement by implication; and in a less technical sense the word debt may sometimes be popularly used to denote any claim for money, or any kind of a just demand. But we most properly use the word debt as denoting in law that money is owed; also that the money is owed by virtue of some agreement or contract between the parties; also that a fixed and specific amount is due, and not something to be ascertained by valuation hereafter.<sup>2</sup> To a debtor corresponds the creditor; and the reciprocal rights of debtor and creditor are defined by positive rules of law which equity cannot vary.<sup>3</sup>

§ 355. **"Obligation" distinguished from Debt; A Word of Larger Scope.** — As a word of larger scope than debt we sometimes use the term "obligation." Now, obligations may be

<sup>1</sup> 3 Bl. Com. 154.

<sup>2</sup> See Bouv. Dict. "Debt;" 2 Bl. Com. 465; *Cable v. McCune*, 26 Mo. 371; *Gray v. Bennett*, 3 Met. 522; *Milldam Foundry v. Hovey*, 21 Pick. 417.

A tax is not in its essential characteristics a debt nor in the nature of a debt; it is not founded on contract or agreement, but operates *in invitum*; whereas a debt is a sum of

money due by agreement, and is founded upon a contract express or implied. Statutes as to taxes are to be interpreted accordingly, as to the presumed legislative intent. *Lane County v. Oregon*, 7 Wall. 80, citing *Camden v. Allen*, 2 Dutcher, 398, and other cases; 111 U. S. 701. Nor is a fine imposed by a court a "debt."<sup>4</sup> How. 21.

<sup>3</sup> *Adler v. Fenton*, 24 How. 407.



legal and legally binding, or moral and only morally binding. A legal obligation should always be a moral one likewise; but all moral obligations are not necessarily legal. An obligation is that which binds one to do something; and a legal obligation binds a person to do something agreeably to the laws of the land. An obligation, in other words, is a duty; and corresponding to duties and obligations are rights. But a person may be under a variety of obligations; he may be obliged to do a piece of work, or to follow the instructions of a superior, or to pay money; and the person to whom he is thus bound has a corresponding right to exact the fulfilment of the obligation. But the only right corresponding to a debt is that of receiving satisfaction in money or its equivalent; and the only thing owed is money or what may be accepted as its equivalent. A debt, then, corresponds most nearly to a money right; though there may be "money rights," so called, growing out of demands for injuries as well as demands under a contract, — corresponding, indeed, to any duty or obligation of one person to pay money over to another.<sup>1</sup>

But the word "obligation" in English law has sometimes quite a technical meaning, which we may as well notice before passing further. It was from an early period used to denote a bond containing a penalty, with a condition annexed for the payment of money, performance of covenants, or the like, therein differing from a bill, which is generally without a penalty or condition, though it may be obligatory; namely, to denote a deed whereby a man binds himself under a penalty to do a thing.<sup>2</sup> The obligor is the person who makes the bond or engages to perform the obligation; and the person in whose favor the obligation is contracted is the obligee. Any obligation may be personal, in the sense that the obligor binds himself to perform an act without directly binding his property for its performance; or, again, personal, in the sense that he binds himself only, without including his heirs

<sup>1</sup> Bouv. Dict. "Obligation;" Inst. 3, 14; 2 Prothier Obl., Evans's ed. 56; Cro. Jac. 251, § 373.      <sup>2</sup> Ib.; Co. Litt. 172; Com. Dig. "Obligation."

or representatives; or, on the other hand, the obligation may be binding on one, and his heirs and representatives; or it may be on the strength of certain property, specially pledged or given as security for its performance. So obligations may be expressed, or they may be implied at law.

§ 356. **Classification of Debts; Priority.**—Coming back to the subject of debts, we find them divided into three leading classes, according to the manner in which they are evidenced. The first class consists of debts of record; the second of specialty debts, or debts by contract under seal; the third of debts founded upon simple contract.<sup>1</sup> For by the old common law, different degrees of security were conferred upon the creditor according as the debt due him came within one or other of these three classes; though this rule, one of priority, has been greatly disturbed of late years by statute, both in England and the United States;<sup>2</sup> for the mode of subjecting a debtor's property to the demands of his creditors rests in the wisdom of the legislature. Let us examine these classes in turn.

§ 357. **Debts of Record, etc.**—A debt of record, then, is a debt which is due by the evidence of some court of record. But what is a court of record? It was formerly said, by English writers, that every court, by having power given to it to fine and imprison, became a court of record.<sup>3</sup> But such a definition is quite insufficient for us of the present day. In this country, and in England likewise, statutes abound which create and define the jurisdiction of the courts, and declare further that they shall be courts of record; having more reference, apparently, in conferring this title, to considerations of convenience,—to the inquiry whether the court does an important local business or not,—than to definite principle. Blackstone is nearly right when he argues, from the primary meaning of words, that a court of record is one where the acts and proceedings are enrolled for a perpet-

<sup>1</sup> See 2 Bl. Com. 466; 3 ib. 154; Wms. Pers. Prop. 5th Eng. ed. 91; Bouv. Dict. "Debt."

<sup>2</sup> See Schoul. Ex'rs, §§ 426-428; Wms. Ex'rs, 997-1009.

<sup>3</sup> Bac. Abr. tit. "Courts," D.

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ual memorial and testimony.<sup>1</sup> Still, this is not a decisive test, even without reference to statutes.<sup>2</sup> Chief Justice Shaw, of Massachusetts, gave the most complete definition of a court of record when he defined it as a judicial, organized tribunal, having attributes and exercising functions independently of the magistrate designated generally to hold it.<sup>3</sup>

By debts of record we mean those debts which are due by the judgment of a court of record and so evidenced by such

<sup>1</sup> 3 Bl. Com. 24, 25.

<sup>2</sup> See remarks in *Woodman v. Inhabitants of Somerset*, 37 Me. 29; *Chitty's n. to 3 Bl. Com.* 25.

<sup>3</sup> *Ex parte Gladhill*, 8 Met. 170.

As to the judgment of a justice of the peace, see *State v. Johnson*, 7 Ired. 231; *Sherwood v. Johnson*, 1 Wend. 443. And see *Holt v. Murray*, 1 Sim. 485.

The tendency in this country is to make every court over which a judge presides a court of record. We have courts of the United States and courts of the several States. There is the Supreme Court of the United States, also the recent Court of Appeals, and, going lower down, we find the Circuit and District Courts, — all courts of record. There is a Supreme Court, or perhaps a still higher Court of Appeals in each State, with inferior tribunals, such as County, District, or Superior Courts; also Police Courts; the title and functions of local courts depending upon local legislation. All of these are, generally speaking, made courts of record. Equity and common-law functions are in most parts of the country blended in the courts of supreme jurisdiction; probate jurisdiction being lodged, however, in special independent tribunals in the first instance, with the right of appeal; while civil and criminal business is divided among the inferior tribunals, just noted, according to convenience. It is a fundamental principle of Amer-

ican policy, that the judiciary shall be separated from the executive and legislative branches. But in England, and at the old common law, the king was the fountain-head of authority, and there is still a closer assimilation found of the three great departments of government than in this country. For in England, Parliament, the law-making power, is also the supreme court of the land; while the superior courts of record are the House of Lords, Chancery, the Courts of Queen's Bench, Common Pleas, and Exchequer; and there are other courts with jurisdiction in probate, divorce, admiralty, and ecclesiastical matters, most or all of which are defined by statute as courts of record. It is said that the inferior courts of record in that country generally consist of the numerous courts established throughout the country, under the recent acts for the more easy recovery of small debts and demands in England. See *Wms. Pers. Prop.*, 5th Eng. ed. 91; also, *Bouv. Dict.* "Court of Record." By the English Judicature Act, 1873, as amended by the Judicature Acts of 1875 and 1876, former high courts are consolidated into a Supreme Court of Judicature, and a High Court of Justice, and Court of Appeal are constituted; appeal to the House of Lords being likewise defined. See *Fisher Digest, Practice* (1870-1880). And see still later Act 44 and 45 Vict. c. 68 (1881).

record. A judgment varies in its nature according to the nature of the action, the plea, the issue, and the manner and result of the decision. A judgment may be *interlocutory*, where the amount of damages is not ascertained; or *final*, where they are fixed and definite. Judgment is entered on the record. But judgment is not necessarily awarded upon the decision of an issue; for an action may be cut off and never come to an issue through failure of the party to follow up his suit, in which case the opposite party becomes the victor; as where the defendant defaults, or the plaintiff nonsuits, and there is consequently no actual exercise of judgment on the part of the court;<sup>1</sup> or where "neither party" is entered.

Books of practice have much to say, in this connection, of a *warrant of attorney* to confess judgment. This warrant of attorney is a security given generally by the defendant to the plaintiff on compromising an action, or even where no action is pending; being so called because it authorizes the person to whom it is given to appear for the defendant in court and receive a declaration in an action of debt for the amount of the intended judgment debt, and thereupon to confess the action or suffer judgment to go by default against him.<sup>2</sup> Like most securities for money by way of penal bond, the penalty is usually as security for about half the sum expressed, and is accompanied by a defeasance, which, as the name implies, defeats the full operation and confines it to the debt and interest only. A warrant of attorney of this kind is generally under seal, though it has been held that the seal is unnecessary.<sup>3</sup> These warrants are often taken in an underhand way, and, giving parties employing counsel or familiar with court practice a decided advantage, they lead frequently to fraudulent and oppressive acts against the debtor, besides operating injustice to the other creditors. While force is given to them still in England and many parts of this

<sup>1</sup> Stephen Pleading, 108-111; 3 Eng. ed. 93-100; Cuthbert v. Dobbin, Bl. Com. 397. 1 C. B. 278.

<sup>2</sup> See Tidd's Pract. 3d Am. ed. 545 *et seq.*; Wms. Pers. Prop. 5th ed. 264. <sup>3</sup> Kinnersley v. Mussen, 5 Taunt.

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country, legislation frequently makes it necessary to have them recorded in order that the judgment debt shall have priority, and renders the judgment void if corruptly or fraudulently obtained. Whatever the condition thus imposed by local statutes, the party having a warrant of attorney must comply with it strictly.<sup>1</sup>

§ 358. **The Same Subject.** — A decree in equity against a person is to be treated like a judgment debt at law, and stands in the same order of preference.<sup>2</sup> By this is meant, of course, a decree for the payment of money; and as decrees to do other acts evidence no debt, properly speaking, the common decree in a foreclosure suit gives no priority.<sup>3</sup>

Debts of record are also constituted by recognizance; the term *recognizance* being applied in practice to an obligation entered into before some court of record or magistrate duly authorized, with condition to do some legal act therein specified as to appear at the next term of court, or to keep the peace, or in a civil case to pay the debt, interest, and costs recovered by plaintiff. The usual object of a recognizance is, to secure the presence of a person, on whom a writ is served, at court when the proper time arrives; and its authentication is not by the party's seal, but by record of the court.<sup>4</sup>

§ 359. **Same Subject; Priority of Debts of Record.** — Such being the usual debts of record in modern practice, the rule, in absence of statutes to the contrary, is, that they take priority of all other debts; yet among these there is found, according to the English rule, a certain order of precedence, where a debtor has died insolvent: judgment debts ranking

<sup>1</sup> *Lawless v. Hackett*, 16 Johns. 149; *Roundy v. Hunt*, 24 Ill. 598; *Harwood v. Hildreth*, 3 Zab. 51; *Fullerton's Appeal*, 48 Penn. St. 144; *Bryan v. Child*, 5 Ex. 368.

<sup>2</sup> *Shaffo v. Powel*, 3 Lev. 355; *Robinson v. Tonge*, 3 P. Wms. 401, *n.*

<sup>3</sup> *Wilson v. Lady Dunsany*, 18 Beav. 293, 299.

<sup>4</sup> 2 Bl. Com. 341; 4 ib. 297, and *n.* by Sharswood; Bouv. Dict. "Re-

cognizance;" Wms. Pers. Prop. 5th Eng. ed. 101. And see 2 Wms. Ex'rs, 6th Eng. ed. 932-944; also works on Criminal Practice. Recognizance bond held good notwithstanding a blank. *Gorman v. State*, 38 Tex. 112. Where a recognizance for the appearance of a principal is joint, and not several, the failure of the principal to appear is a breach of the condition. *Mishler v. Commonwealth*, 62 Penn. St. 55.

first, without priority among themselves, and debts by recognition second.<sup>1</sup>

§ 360. **Specialty Debts; Covenants, Bonds, etc.**—Next after debts of record, come specialty debts, which are debts evidenced by contracts under seal,—as on bonds, covenants, and other instruments under the seal of the party to be bound. All these, as special-contract debts, are, by the common law, preferred to debts by simple contract.<sup>2</sup> Where, too, the relation of landlord and tenant exists between parties, arrears of rent are entitled to the rank of the specialty; but this right, which grows out of privity of estate, not privity of contract, applies equally on feudal principles, whether the rents were reserved by lease or by parol.<sup>3</sup> Here, again, the old rule was to subdivide in certain cases, as to the order of precedence.<sup>4</sup>

The instrument by which a specialty debt is created may be a deed containing some covenant for the breach of which money is due from the party who covenants. A covenant may be after this form: "And I, the said A. B., for myself and my heirs, executors, and administrators, do hereby covenant to and with the said C. D., his heirs and assigns," or, "his executors and administrators," to do or not to do something specified.<sup>5</sup>

Or, again, the instrument may be in the form of a bond; this being an obligation in writing and under seal. Bonds may be *single*,—*simplex obligatio*,—as where the obligor binds himself, his heirs, executors, and administrators, to pay a certain sum of money to another at some future day designated; or, they may be *conditional* (as they usually are), that if the obligor does some particular act, the obligation shall be void, or else remain in full force.<sup>6</sup> We are to

<sup>1</sup> 2 Wms. Ex'rs, 932, 939; Schoul. Ex'rs, § 426. But as to technical distinctions founded upon the date of entering judgment, see *ib.*

<sup>2</sup> 9 Co. 88 b; 2 Bl. Com. 341; 2 Wms. Ex'rs, 6th Eng. ed. 944.

<sup>3</sup> 2 Wms. Ex'rs, 945 and n.; Clough v. French, 2 Coll. 277; Willett v. Earle, 1 Vt. 490; Kidd v. Boone, L. R. 12 Eq. 89.

<sup>4</sup> 2 Jarm. Wills, 2d ed. 496, 510; Richardson v. Jenkins, 1 Drew. 477; Schoul. Ex'rs, § 427.

<sup>5</sup> See Bouv. Dict. "Covenant;" U. S. Dig. "Covenant;" Wms. Pers. Prop. 6th Eng. ed. 102.

<sup>6</sup> Bouv. Dict. "Bond;" U. S. Dig. "Bond;" Wms. Pers. Prop. 103 *et seq.* In this country a bond often runs to this effect: "Know all men

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observe that the condition need not be to pay a certain sum of money. It may be for a variety of purposes: as, for instance, to perform an award, to execute a conveyance, to refund payment of a legacy in certain contingencies, and so on. There are official bonds, as that a treasurer shall perform his duties properly, and bonds of indemnity to secure a person who pays over money under doubtful circumstances against the risk of compulsion to pay again. Statutes require bonds to be given under a great variety of circumstances; and under the head of shipping we find bottomry and *respondentia* bonds. Bonds are frequently given with sureties, who, in default of the principal party, are themselves liable for the debt.

§ 361. **The Same Subject.** — The mere recital of a debt under hand and seal is held to be no specialty debt. For while a recital of the existence of a debt may amount, by reference to the context, to an implied contract or covenant to pay, it does not of itself necessarily imply such a contract or covenant.<sup>1</sup> And if there be a conveyance on trust, the mere conveyance does not amount to any contract on the

by these presents, that I, A. B., of [such a place], am held and firmly bound unto C. D., of [such a place], in the sum of one thousand dollars, good and lawful money of the United States, to be paid to the said C. D., his executors, administrators, and assigns; to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, dated "[at such a time]". Here we observe that executors and administrators are bound in express terms as well as the heirs; though a covenant or bond does not need these words, since the mention of "heirs" alone would make it equally effectual. Co. Litt. 209 a; Barber v. Fox, 2 Wms. Saund. 186. This form would suffice for a simple bond; but in a conditional bond, the condition follows.

Thus, if the condition be to pay money, these words might follow: "The condition of this obligation is such, that if the above-bound A. B., his heirs, executors, and administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above-named C. D., his executors, administrators, or assigns, the full and just sum of five hundred dollars, lawful money as aforesaid, with interest for the same at the rate of six per cent per annum, on or before [such a date], without fraud or further delay [or without any deduction or abatement whatsoever], then this obligation shall be void, otherwise shall remain in full force and virtue."

<sup>1</sup> Lacam v. Mertins, 1 Ves. Sen. 313; Ivens v. Elwes, 3 Drew. 25; 6 De G. M. & G. 572.

trustee's part; whence it follows that a mere breach of trust does not constitute a specialty debt; the more so if the trustee never executed the deed. But it is otherwise if the language of the deed be clear and strong enough to raise a covenant on his part.<sup>1</sup> Breaches of trust are generally ranked *per se* among simple-contract debts; yet in cases where the debt and breach of trust both arise from the violation of some obligation under seal, they are entitled to rank with specialty debts.<sup>2</sup> Debts due by covenant are, of course, specialty debts of the same nature as those by bond.<sup>3</sup> And debts by mortgage are usually ranked in this same class, because of the covenant or bond which is expressed for payment of the money; though in respect merely to the promissory note which the mortgage secures, they would seem to belong to the class of simple-contract debts.<sup>4</sup>

<sup>1</sup> Adey v. Arnold, 2 De G. M. & G. 432, 437; 2 Wms. Ex'rs, 951-953; Richardson v. Jenkins, 1 Drew. 477.

<sup>2</sup> Benson v. Benson, 1 P. Wms. 130; Turner v. Wardle, 7 Sim. 80; 2 Wms. Ex'rs, 952.

<sup>3</sup> See 2 Wms. Ex'rs, 950, and cases cited; Plumer v. Marchant, 3 Burr. 1380.

<sup>4</sup> See Galton v. Hancock, 2 Atk. 485; Howell v. Price, 1 P. Wms. 291. There are numerous decisions as to bonds. For instance, the writing which purports to be an obligation should name the obligee. Pelham v. Grigg, 4 Ark. 141; Phelps v. Call, 7 Ired. 262. But it is unnecessary that the obligor's name should appear in the bond, provided it be signed and sealed by him. Pequaw-kett v. Mathes, 7 N. H. 230; 5 Mass. 538; 7 Cow. 484; Ahrend v. Odiorne, 125 Mass. 50. A bond should be signed, sealed, and delivered in order to gain full force. And the usual rules applicable to contracts under seal here apply. An ante-dated bond does not bind for the period preceding delivery, if the language is not

retrospective. Hyatt v. Sewing-Machine Co., 41 Mich. 225. See 10 Bush, 23. A statute bond, to be good as such, must be conditioned and executed according to all the statute requirements. But if not, it might be good at the common law. Howard v. Brown, 21 Me. 385; 1 Brock. 177.

Where a bond is conditioned for the payment of a certain sum, and no time is fixed therein for payment, it is in law a covenant for immediate payment. Rhoades v. Reed, 89 Penn. St. 436. When a bond has a condition for performance preceded by recitals, it is a general rule that, where the undertaking is general, its obligatory force shall be limited within the recitals. Sanger v. Baum-berger, 51 Wis. 592. Where the conditions of a bond which are not sustainable are severable from those which are, the latter hold good *pro tanto*. United States v. Mora, 97 U. S. 413.

Sureties to a penal bond are not holden if the person named as principal fails to execute. Russell v. Annable, 109 Mass. 72.



A bond is good, though a voluntary one ; that is to say, where no consideration was contracted for or expected.<sup>1</sup> For where we say that the "want of consideration" is a defence to a bond, we mean that where the obligor fails to receive the consideration contracted for, and on the faith of which he entered into the obligation, he need not pay his bond.<sup>2</sup> At the same time, a voluntary bond is postponed in equity to all creditors, even to those who have simple-contract debts ; on the broad principle that volunteers cannot stand in the way of one's creditors, — a principle subject to some exceptions.<sup>3</sup> In general a bond under seal imports a consideration.<sup>4</sup>

<sup>1</sup> *Lomas v. Wright*, 3 Myl. & K. 769 ; *Candor's Appeal*, 27 Penn. St. 119 ; *Archer v. Hart*, 5 Fla. 234 ; U. S. Dig. 1st Series, Bonds, 19 ; 2 Johns. 177 ; 2 Mass. 159. An illegal consideration vitiates a bond. U. S. Dig. 1st Series, 26, 29.

<sup>2</sup> See *Lewis, C. J.*, in *Candor's Appeal*, 27 Penn. St. 119 ; *Mount Pleasant v. Hobart*, 25 Kan. 719. Parol evidence of the circumstances of the transaction is now usually admitted. *Chicago v. Gage*, 96 Ill. 593.

<sup>3</sup> See 1 Eq. Cas. Abr. 84, pl. 2 ; *Stephens v. Harris*, 6 Ired. Eq. 57 ; *Tanner v. Byne*, 1 Sim. 160 ; *Payne v. Mortimer*, 4 De G. & J. 447. The duty of executors and administrators in settling the estate of the dead person whom they represent is usually to pay debts all the same, whether due presently or in the future. And yet a mere contingent debt is not recognized until the contingency transpires and the debt becomes absolute. 5 Co. 28 b ; 3 Redf. Wills, 2d ed. 260 ; *Read v. Blunt*, 5 Sim. 567 ; *Bacon v. Thorp*, 27 Conn. 251 ; 2 Wms. Ex'rs, 6th Eng. ed. 955-957, and cases cited. Such questions come up in dealing with bonds of indemnity and the like, which would occasion great perplexity did not equity mould its doctrines to meet each case. The

law formerly was, that on breach of any part of the condition the whole penalty became due ; and judgment and execution might be had thereon, subject only to the interference of equity upon application for relief. But now the obligee must usually, in common-law practice, state or assign the breaches made by the obligor, when he sues ; and though judgment be recovered for the whole penalty, execution issues only for damages in respect to the breaches actually committed, and the judgment remains as a further security against future breaches. Wms. Pers. Prop. 5th Eng. ed. 104 ; *Grey v. Friar*, 15 Q. B. 891, 910. Bonds were formerly enforceable to the full extent of the penal sum. But equity subsequently interfered, and prevented the creditor from enforcing more than the amount of damage he had actually sustained. The courts of law adopted afterwards the same rule. Finally came legislation to confirm the practice by providing that payment of the lesser sum named in the bond, with interest and costs, should be taken in full satisfaction. And now this principle is fully recognized in England and America ; and bonds are usually made out for double the amount of debt actually created, in the expecta-

<sup>4</sup> *Barrett v. Carden*, 65 Vt. 431.

§ 362. **Simple-Contract Debts.** — Simple-contract debts stand lowest on the list. And all debts by contract not under seal, whether verbal or written, belong to this class; including bills and notes in general ("sealed notes" being of course excepted), and indeed all debts which have not already been enumerated as belonging to one or the other of the two preferred classes.<sup>1</sup>

§ 363. **Priority of Debts depends sometimes upon the Parties concerned.** — Hitherto we have considered the doctrine of priority of debts according to the nature of the debt. But preferences are often founded upon the parties concerned instead of the subject-matter. Thus government has long been disposed to assert its own priority over private creditors.<sup>2</sup>

tion that they will be cut down if sued upon. See Litt. 340; Stat. 4 & 5 Anne, c. 16, §§ 12, 13; 2 Bl. Com. 341; Wms. Pers. Prop. 103. For unless there has been vexatious delay interposed by the debtor, or the debt is collaterally secured as by bond and mortgage, the universal rule is, that no one can recover more than the penalty named in the bond either at law or in equity. *Clarke v. Seton*, 6 Ves. 411; *Clarke v. Lord Abingdon*, 17 Ves. 106; *Grant v. Grant*, 3 Sim. 340.

<sup>1</sup> 2 Wms. Ex'rs, 6th Eng. ed. 958.

<sup>2</sup> In England the sovereign is preferred to all others, provided the debt be a debt of record, or a debt by specialty; and if the debt be by simple contract alone, he will have preferences over the other simple-contract creditors of the debtor, and, as some say, even over other creditors by specialty. *Bac. Abr. Ex'rs*; 2 Wms. Ex'rs, 958. In this country the United States has been constituted a preferred creditor by statute, though whether the right is founded in sovereign prerogative seems not clearly settled. 1 Kent Com. 243-248, and cases cited; *Bright. Fed. Dig.* 75, 717. The United States has the constitutional power to declare its priority

in four cases: (1) where a debtor dies without leaving sufficient assets; (2) where a debtor is a legal bankrupt or insolvent; (3) where a debtor is insolvent, and voluntarily assigns all of his property to pay his debts; (4) where a debtor absents or conceals himself or absconds, and his effects are attached by process of law. 1 Kent Com. 247. Prerogatives like these are, of course, in derogation of the rights of the citizen, and should not rest upon uncertainty. The priority of government is not in the nature of a lien; nor can it defeat prior mortgages, attachments, or liens generally, which already exist for the benefit of private creditors. See *Beaston v. Farmers' Bank of Delaware*, 12 Pet. 102; *Bright. Fed. Dig.* 75, 717; 10 Pet. 596.

The modern tendency, especially in this country, is to upturn the whole doctrine of priority according to the classes of debts, and where a debtor is insolvent to introduce preferences among private claimants founded rather upon considerations of decency and humanity. Thus, by the statutes of most States, the expenses of last illness and funeral, and the administration expenses, are placed upon the common footing of priority

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§ 364. *Rule as to Preferences among Creditors.*—In legal assets, attachment or execution creditors are as a rule entitled to priority, subject of course to pre-existing liens. The creditor who thus gets priority at law is entitled to retain it. But the principle which obtains in equity, and which is recognized especially in settling insolvent estates of the dead or living, is, subject to the preferred classification already noticed, to share the estate among creditors in their just and due proportions. Yet superior diligence may give a preference in equity, where no question of insolvent distribution arises, but the controversy is rather over a particular fund; and the creditor first pursuing the fund will be entitled to the benefit of it over other creditors.<sup>1</sup> Under bank-

over all the general debts of a deceased person. See 3 Redf. Wills, 249; 2 Wms. Ex'rs, 890. And the wages of domestic servants and of laborers are, whether as legally or morally binding, treated with considerable favor wherever an insolvent estate is wound up. 2 Bl. Com. 611; 2 Wms. Ex'rs, 958; Schoul. Ex'rs, § 428. So, too, the widow of a deceased insolvent has special allowances granted for the wants of herself and children, that they may not be left utterly destitute. See Schoul. Ex'rs, § 451. In many parts of the United States the order of paying the expenses and debts of a deceased person in case of insolvency is prescribed by local statute. Schoul. Ex'rs, § 428, and note. And general bankrupt or State insolvent laws are expressed with corresponding precision. See Redf. Wills, 249, 250, n.; *Wilson v. Shearer*, 9 Met. 504; 2 Kent Com. 419 n.

Not to examine more minutely the American statutes on this perplexed subject of priority, it is enough to add that, while we find a recognition admitted to be of higher dignity than a debt by specialty by many of our courts, we also find that all distinctions as to order of payment be-

tween specialty and contract debts are rapidly fading out of American practice. In some States, docketed judgments are entitled to priority according to the order of docketing. It is quite common to place most simple-contract debts as on the same footing with certain specialty debts. See various statutes cited in 2 Kent Com. 417-419, n.; 3 Redf. Wills, 255, n.; Schoul. Ex'rs, §§ 426-428. In England such was the dissatisfaction in later times with the preferential distinctions between the specialty and simple-contract debts of deceased persons, that Parliament, by Stat. 32 & 33 Vict. c. 46, abolished (1870) all such priorities. In short, the whole doctrine of priority is shaped by legislation; and sometimes debts are classed according to the form of the debt, sometimes according to the party creditor, and sometimes according to the nature of the debt. Local statutes create at pleasure purely arbitrary preferences. And whatever the legal preference among debts, existing liens on the property, whether created by law or contract, must first be satisfied. See *Turain v. Gibson*, 3 Atk. 720; *Lloyd v. Mason*, 4 Hare, 132; c. on Liens, *post*.

<sup>1</sup> *Codwise v. Gelston*, 10 Johns.

rupt or local insolvent laws, the doubtful policy is sometimes still sustained of permitting an insolvent who assigns to prefer as among his own creditors.<sup>1</sup>

§ 365. **How a Debt is discharged.** — Debts are discharged in various ways ; but the principal method, according to the law-books, and certainly the most proper, as all creditors will admit, — though debtors sometimes think otherwise, — is by payment. And by payment we usually mean the discharge in lawful money of the sum due. Yet, as we have seen in the preceding chapter, debts may be practically discharged by giving goods in return, or by rendering some service, or by paying checks, notes, or bills, under suitable circumstances, as the accepted substitute for money.<sup>2</sup> Sometimes the duty to pay and the right to receive payment vest eventually in the same person. A debt may also have been released by the creditor. And when one is a *bonâ fide* bankrupt or insolvent, an opportunity is afforded him by the bankrupt or insolvent laws to have all his debts wiped out after he has surrendered up his property and otherwise complied with the requirements of statute. So, when one dies, his debts, whether he leaves the means for paying them or not, become discharged by the final settlement of his estate, and his heirs need not assume a dollar of them. And, to a certain extent, the policy of our law permits a person to hold articles of property necessary and suitable for himself and his family, free from the demands of all creditors whomsoever ; while a creditor may likewise lose the opportunity of recovering the debt due him, by neglecting to bring suit within the period fixed by the statute of limitations. And though the honest payment of debts was so strongly enforced and inculcated in the days of our Anglo-Saxon ancestors, that a poor man who failed to pay his creditor might be thrown into prison, the established American policy and the prevailing tendency of legislation in all civilized countries is to abolish utterly

507 ; Gordon v. Lowell, 21 Me. 251 ; Fitzpatrick v. Flannagan, 106 U. S. 4 Johns. Ch. 687 ; 2 Stew. (Ala.) 648.

378.

<sup>1</sup> See Clarke v. White, 12 Pet. 178 ; 13 How. 345.

<sup>2</sup> See *supra*, § 351 ; Very v. Levy,

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the penalty of imprisonment for debt, to set the unfortunate man on his feet, and bid him go forth and try once more to make a name and gain an honest livelihood.<sup>1</sup>

§ 366. **The Same Subject; Effect of Paying Smaller Sum, etc.**—Concerning the payment of debts, there are a great many reported cases in the books, by no means harmonious in the conclusions they reach; these questions usually arising where a partial payment of the debt is made by the person owing it. But we may now accept it as a rule, that the payment of a smaller sum is no valid legal discharge of a larger one, and cannot be pleaded either as payment of an unquestioned debt, or as accord and satisfaction, unless there be some legal benefit or legal possibility of a benefit to the creditor, sufficient to amount to a consideration for his promise to relinquish the residue.<sup>2</sup> For even if the creditor

<sup>1</sup> See 1 Poth. Obl. 408, 429, 443, 449; Bouv. Dict. "Debt;" 2 Kent Com. 403. The full discussion of these subjects belongs properly to other works. There may be a technical discharge of a debt, not as a fact, but by operation of law; for instance, where two are jointly liable and a judgment is obtained against one, the debt is extinguished as against the other. Wms. Pers. Prop., 5th Eng. ed. 284. A deed which discharges a joint debt may discharge the several liabilities of the joint debtors also. Rixon v. Emary, L. R. 8 C. P. 546. See Gates v. Andrews, 87 N. Y. 657. And, in general, a release to one of several joint debtors, on accepting his proportion of the debt, is considered in some States a release of all the joint debtors. Milliken v. Brown, 1 Rawle, 391. But see Smith v. Bartholomew, 1 Met. 276. And where a creditor accepts the sole liability of one or more joint debtors, this is a good consideration for his agreement to discharge all the other debtors from liability. Lyth v. Ault, 7 Ex. 669; Sheehy v. Mandeville, 6 Cr. 253. Where two

are jointly bound as principals, release of one will operate to release the other unless the remedy is expressly reserved. Yates v. Donaldson, 5 Md. 380. Though joint creditors cannot generally divide a claim, yet if a debtor procures release from a portion of them he cannot object that the others sue separately in equity. Upjohn v. Ewing, 2 Ohio St. 13. Taking new security from one of two joint debtors will release the other, only where express or implied intention of creditor favors. Parker v. Cousins, 2 Gratt. 372. On the death of one of two joint debtors, the creditor may proceed against the survivor, or against the estate of the deceased, at his option. 105 Ind. 243. Agreement of creditor to discharge one partner, on his securing the payment of a portion of the debt, but reserving the right to proceed against another partner, is held (without here discussing principles, but rather considering the intent), not to operate to discharge the latter partner. Browning v. Grady, 10 Ala. 999.

<sup>2</sup> Norman v. Thompson, 4 Ex. 755; Cumber v. Wane, 1 Str. 426; s. c.,

so agreed, his promise is *nudum pactum*, and without legal force. And yet the modern tendency, especially in this country, where credit is frequently so carelessly or unwisely given, and it is often found quite convenient to take what a debtor offers rather than run the risk of losing all that is due, is undoubtedly to strain a point for discovering some new consideration or collateral benefit, so as to sustain the creditor's promise to take the lesser sum in satisfaction of the greater.<sup>1</sup> And the concurrence of some or all of the other creditors of a debtor in extending time or accepting a composition, will prevent such promises from being a *nudum pactum*.<sup>2</sup> An agreement to release a debt based upon the performance of

with notes and comments, 1 Smith Lead. Cas. 439 *et seq.*; Fitch v. Sutton, 5 East, 230; Cooper v. Parker, 15 C. B. 322; Evans v. Powis, 1 Ex. 601; Dederick v. Leman, 9 Johns. 333; White v. Jordan, 27 Maine, 370; Warren v. Skinner, 20 Conn. 559; Curtiss v. Martin, 20 Ill. 557; Harriman v. Harriman, 12 Gray, 341; 69 N. C. 45; 64 Barb. 215; 64 Cal. 65; 89 Ind. 352.

<sup>1</sup> See Kellogg v. Richards, 14 Wend. 116; Brooks v. White, 2 Met. 283; Harper v. Graham, 20 Ohio, 105; 1 Smith Lead. Cas. 447, Hare & Wallace, notes.

<sup>2</sup> *Ib.*; § 372, *post*. Accord and satisfaction ought to be full, perfect, and complete, in order to stand strongly. As to equivocal acceptance see Willey v. Warden, 27 Vt. 655. Taking certain other property of the debtor as in full satisfaction, may, in a perfectly fair and *bona fide* case, suffice. Williams v. Phelps, 16 Wis. 80; Very v. Levy, 13 How. 345. And see 1 Gray, 245. But the money or property must have been accepted in payment, and not by way of security. Barnes v. Lloyd, 1 How. (Miss.) 584. It is said that accord of a deed cannot be by parol; but an instrument under seal requires something equally high; this, however, being a purely technical rule, loses much of

its old force in modern times. See 12 Ark. 148; 1 How. (Miss.) 584; Young v. Power, 41 Miss. 197. Hinckley v. Arey, 27 Me. 362, goes even farther for a debtor's benefit.

Acceptance of a less sum before payment is due may constitute a good satisfaction of the debt. Bowker v. Childs, 3 Allen, 434; 2 Met. 283. Where debt is paid as to principal, and the payment falls short only in interest, the rule of insufficiency of part payment is not to be favored. Johnston v. Brannan, 5 Johns. 268. But fraud and misrepresentation may be shown (at all events in equity) to vitiate the accord. Stafford v. Bacon, 1 Hill, 532; Shaw v. Clark, 6 Vt. 507. And accord without satisfaction is not a bar to an action; for, in general, accord should be executed and not executory. 6 Wend. 390; Clark v. Bowen, 22 How. 270; 13 Ga. 406; 15 Iowa, 584; Blackburn v. Ormsby, 41 Penn. St. 97. Creditor's delay to sue until the debt is outlawed may bar or impede recovery, but it does not extinguish the debt. 1 Ala. 708. Nor does death or the insolvency of the creditor. 1 La. An. 365. Nor, necessarily, does the release of a debt in terms by one's will. Hobart v. Stone, 10 Pick. 215. And see U. S. Dig. 1st series, Debtor and Creditor, 8-23.

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specified considerations requires, of course, performance before the satisfaction is complete.<sup>1</sup>

The rule that payment of a smaller sum cannot be a satisfaction of a larger debt, applies, too, only to cases of strict debt,—that is, where the larger sum owing by contract is fixed and liquidated, or so ascertained by mere arithmetical calculation; and not to claims and demands in general, where the sum which should be paid is unliquidated and unascertained in amount.<sup>2</sup> We have seen that, as to persons jointly indebted, the liability of one is sometimes accepted as a substitute for that of all.<sup>3</sup> Where again the debt is in dispute as to amount or just legal existence, a sum may be mutually and deliberately agreed upon and accepted by way of compromise.<sup>4</sup> Undoubtedly, the creditor's acknowledgment of payment in full is *prima facie* evidence that the whole has been paid him; though every mere receipt is open to explanation.<sup>5</sup> And a solemn release under seal, suitably expressed in terms and *bona fide* given, may preclude all claim on the creditor's part that more remained due.<sup>6</sup>

<sup>1</sup> *Memphis v. Brown*, 20 Wall. 289.

<sup>2</sup> *Wilkinson v. Byers*, 1 Ad. & Ell. 106; *McDaniels v. Lapham*, 21 Vt. 223; *Lamb v. Goodwin*, 10 Ired. 320; *Brown v. Cambridge*, 3 Allen, 474; 96 U. S. 430.

<sup>3</sup> *Supra*, § 365, n.; *Lyth v. Ault*, 7 Ex. 669; *Sheehy v. Mandeville*, 6 Cr. 253.

<sup>4</sup> *Palmerton v. Huxford*, 4 Denio, 166; *Cool v. Stone*, 4 Iowa, 219; *Draper v. Pierce*, 29 Vt. 250. If there be a *bona fide* dispute as to the amount due from one person to another, or the amount be uncertain and unliquidated, a *bona fide* and voluntary compromise and payment of a certain agreed sum as a satisfaction of the entire claim is valid. *Fire Ins. Asso. v. Wickham*, 141 U. S. § 564. A suit may be compromised and payment becomes accord and satisfaction. 120 U. S. 198. Prepayment of part of a claim may by

agreement afford consideration for release of the residue. 141 U. S. 564. As to compromise agreements see § 372.

<sup>5</sup> See *Marshall, C. J.*, in *Henderson v. Moore*, 5 Cr. 11. A receipt given by a third person is not evidence of payment as against a creditor who did not authorize. *Ferris v. Boxell*, 34 Minn. 262.

<sup>6</sup> As a general rule a payment of less than the whole of an undisputed debt to a fixed amount, already payable, is not a satisfaction of the balance; even though it were agreed to be received in full of the whole debt. The obligation of the debtor to pay the whole amount being complete, his engagement to pay a part forms no consideration for the agreement to release the balance; hence that agreement forms no bar. To render the release of balance obligatory there must be something in the transaction

§ 367. **Effect of Debtor's Note or Check by Way of Discharge of Debt.** — Whether the debtor's own check or negotiable note, given in discharge of the debt, amounts to a valid discharge, is sometimes made a question; and upon this point authorities differ somewhat in this country, though by the better opinion the intent of the transaction depends upon the facts. A good check which has been taken in payment will generally have the effect of cancelling the debt; though, if the check prove worthless, there is no payment; and in general the presumption is that any check is regarded originally not as payment *per se*, but as a means of procuring at once the money.<sup>1</sup> But as to a promissory note it is quite

which can be treated as a new consideration. *Daniels v. Hatch*, 1 Zab. 391; 141 U. S. 564; *United States v. Bostwick*, 94 U. S. 53; *Geiser v. Kershner*, 4 Gill & J. 405; *Sullivan v. Finn*, 4 Greene (Iowa), 544; *Bailey v. Day*, 26 Me. 88. Much less does the agreement to receive the less sum bind as agreement before the payment in part, &c., is actually made. *Smith v. Keels*, 15 Rich. L. 318; *Palmer v. Yager*, 20 Wis. 91. We observe, however, that the cases which follow this general rule generally present as facts, and often so state as principle, a parol satisfaction of this sort; and *semble* if a release in full under seal were given, this would import such consideration that creditor could not sue for residue. See *Bohr v. Anderson*, 51 Md. 205; *Fitzsimmons v. Ogden*, 7 Cr. 2. But by this is meant a genuine release in terms. For an instrument under seal which purports upon its face to be no accord and satisfaction is no release under seal. *Young v. Jones*, 64 Me. 563.

Sanford, J., says: "The reason given for the rule is, that the creditor's agreement is without consideration. The rule, however, supposes the part performance of the original obligation, the payment of part at

the time and in the manner originally stipulated for the payment of the whole; from which payment of a part rather than the whole, no benefit can accrue to the creditor, and no injury to the debtor." "But when a new duty," he continues, "is undertaken by the debtor which is, or may be burdensome to him or beneficial to the creditor, a new consideration arises out of such undertaking and sustains the agreement of the creditor; as when the debtor undertakes to pay and pays part, at an earlier day, or at another place, or in another article, than required by the original obligation." *Rose v. Hall*, 26 Conn. 392. See also *Jones v. Bullitt*, 2 Litt. (Ky.) 49, where something else in lieu of the debt given was held binding; 35 N. J. Eq. 326.

<sup>1</sup> *Downey v. Hicks*, 14 How. 240. See Bright. Fed. Dig. "Debtor and Creditor," 244; *Barnard v. Graves*, 16 Pick. 41; *Smith Lead. Cas. Am. ed.* 459, n. Whether the check was given and received in absolute discharge of the debt depends on the evidence. *National Bank v. Levy*, 17 R. I. 746. Payment by a worthless check, or on a bank where the debtor has no money, is not payment. *Fleig v. Sleet*, 43 Ohio St. 53; *Woodburn v. Woodburn*, 115 Ill. 427.



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different; for a man's note is generally taken not in payment but as a postponement of payment until the note falls due; unless, indeed, by indorsement or otherwise, the debtor enlarges the creditor's security. The rule in some States is, that where one indebted gives his note for the debt, the creditor *prima facie* accepts it in satisfaction and discharge of that debt; but that this is a presumption of fact only, and may be rebutted.<sup>1</sup> Yet by the common-law rule it appears that the note so given would not operate to discharge the original obligation unless such mutual intention affirmatively appear.<sup>2</sup> Distinctions of this sort as to presumption are quite fine, and every case doubtless stands upon its own merits after all; the real intention of the parties being, in any event, and under the particular circumstances, open to explanation.<sup>3</sup> And, we might add, there is usually an advantage to the creditor in taking a debtor's own note in payment of a mere debt, since the evidence that so much is actually due is more easily established in case a suit becomes necessary; and it may be presumed to fix the amount actually due.<sup>4</sup>

Where a check for less than the amount due is sent by the debtor as in express satisfaction, and kept and collected by the creditor, a complete accord and satisfaction cannot be legally concluded, but the intent is still a question of fact.<sup>5</sup>

§ 368. **The Same Subject; Effect of giving a Higher Security, etc.**—The supposition that a discharge and satisfaction of the original debt was contemplated becomes still more rea-

But any creditor, it would appear, ought as the payor's agent to present a check for payment with reasonable diligence, or else bear the loss of the bank's failure. See 16 Neb. 416.

<sup>1</sup> See *Hudson v. Bradley*, 2 Cliff. 130; *Jaffrey v. Cornish*, 10 N. H. 505; *Hart v. Boller*, 15 S. & R. 162; *Fowler v. Bush*, 21 Pick. 230; *Fowler v. Ludwig*, 34 Maine, 455; *Melledge v. Boston Iron Co.*, 5 Cush. 170; 34 Mo. 147; *Draper v. Hitt*, 43 Vt. 439.

<sup>2</sup> See *Kimball v. The Anna Kimball*, 3 Wall. 37; s. c. 2 Cliff. 4; 1

*Salk.* 124; *Downey v. Hicks*, 14 How. 249. The holder of a check or negotiable instrument, who takes it for a pre-existing debt, is a holder for value. *Currie v. Misa*, L. R. 10 Ex. 153.

<sup>3</sup> See 21 Fla. 374; *Wiles v. Robinson*, 80 Mo. 47; *Keel v. Larkin*, 72 Ala. 493.

<sup>4</sup> See *Bishop v. Welsh*, 35 Ind. 521.

<sup>5</sup> *Day v. McLea*, 22 Q. B. D. 610. Here the creditor's response showed that he kept the check in part payment only.

sonable whenever the creditor has accepted from the debtor a higher security or obligation for the lower security or obligation. Hence it is usual to consider that a bond or other sealed instrument, given as an obligation for a debt, extinguishes a simple-contract liability therefor; the legal obligation of the inferior instrument being thus regarded as blotted out.<sup>1</sup> And where judgment is given on a bond or unsealed contract, the debt by bond or contract is extinguished, or merges in the higher debt by judgment.<sup>2</sup> Yet, however strongly this doctrine is asserted, there is a disposition to slip from under it when it bears down heavily; for, after all, courts are solicitous of ascertaining, in all such instances, the genuine intention of the parties, and giving that intention effect;<sup>3</sup> and furthermore, as we have seen, much of the priority advantage which our earlier law gave to certain obligations has become obsolete.

If the higher security given be not between the same but different persons,—if, for instance, the bond of a third person or a judgment against him be taken,—the presumption is in favor of regarding this as a mere collateral or conditional payment; though here it may be shown, by evidence, that the acceptance thereof was intended to amount to a full and entire extinguishment and satisfaction of the original debt.<sup>4</sup> Here, again, the question of intention becomes material to the issue. And this regard which is paid to the intention of parties may further be illustrated by the well-established English rule, that if a deed admits a simple-contract debt, and no more, the debt remains a simple-contract debt; but that if the deed not only admits the debt, but contains further covenant that, if it is not paid before a certain

<sup>1</sup> *Curson v. Monteiro*, 2 Johns. 308; *Pleasants v. Meng*, 1 Dall. 380; *Jones v. Johnson*, 3 W. & S. 276; 131 Mass. 467.

<sup>2</sup> See *Butler v. Miller*, 1 Denio, 407; *Early v. Rogers*, 16 How. 599.

<sup>3</sup> Cases *supra*; *Maddin v. Edmondson*, 10 Mo. 643; *Yates v. Donaldson*, 5 Md. 389; *Taylor v. Bank of Alexandria*, 5 Leigh, 471; *Brown v.*

*Dunckel*, 46 Mich. 29; 21 S. C. 126; *Pelzer v. Steadman*, 22 S. C. 279.

<sup>4</sup> See *Yates v. Aston*, 4 Q. B. 182; *Bell v. Banks*, 3 M. & Gr. 258; *Bank of Columbia v. Patterson*, 7 Cr. 299. But see *Bray v. Bates*, 9 Met. 237; 1 Smith Lead. Cas. 161. See *Davis v. Anable*, 2 Hill (N. Y.), 339; *Baker v. Baker*, 4 Dutch. 13; *Langdon v. Paul*, 20 Vt. 217.

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time, the maker of the deed will pay it, or words to that effect, the deed makes the debt a specialty debt.<sup>1</sup>

§ 369. **General Rule as to accepting Note or Obligation of Third Person, etc., in Payment.** — In general, the note or other mercantile obligation of a third person may be offered and accepted to discharge one's debt. And this, in various instances, would be made like receiving payment in a commodity.<sup>2</sup> Acceptance of any collateral thing, if of legal value, as in *bonâ fide* satisfaction of a previous debt, is a good accord, and one security may sometimes be pleaded in bar of another by way of accord.<sup>3</sup> And the taking up of one note or security with the substitution of another extinguishes presumably the first note, discharging the first indorser or surety, if there be one.<sup>4</sup> The intervention of a third person's obligation, whether the security be higher or not, may by mutual agreement afford accord and satisfaction, and may even furnish good consideration for relinquishing part of the debt.<sup>5</sup>

But the mere taking of collateral security for a debt does not *per se* and without agreement amount even to an extension of time for payment of the original debt; <sup>6</sup> it is at all

<sup>1</sup> See *Saunders v. Milsome*, L. R. 2 Eq. 573; *Isaacson v. Harwood*, L. R. 3 Ch. 225.

<sup>2</sup> The creditor's sale of such a mercantile obligation will generally preclude a suit on the original debt. *Donnelly v. District*, 119 U. S. 339.

<sup>3</sup> *Lee v. Oppenheimer*, 32 Me. 253; *Sanders v. Branch Bank*, 13 Ala. 353; U. S. Dig. 1st series, Debtor and Creditor, 100, 101; *Goodrich v. Stanley*, 24 Conn. 613. As to paying by worthless negotiable paper, see 37 Conn. 167; *Monticello v. Grant*, 104 Ind. 168. Collateral consideration, moving from a third person, to take no advantage may afford the basis of a valid accord and satisfaction. *Booth v. Campbell*, 15 Md. 569. Accord is not readily presumed where the security taken was not only that of a different person but for a different

sum. *Davidson v. Kelly*, 1 Md. 492. As to receiving gold in payment when gold was at a premium, see 106 Mass. 410.

<sup>4</sup> 10 Yerg. 410; *Weston v. Wiley*, 78 Ind. 54; *Brown v. Dunkel*, 46 Mich. 29.

<sup>5</sup> 27 Barb. 485; *Gunn v. McAden*, 2 Ired. Eq. 79; *Leavitt v. Morrow*, 6 Ohio St. 71; *Fort v. Barnett*, 23 Tex. 460; *Bowker v. Harris*, 30 Vt. 424; *Colburn v. Gould*, 1 N. H. 279.

<sup>6</sup> *Cary v. White*, 52 N. Y. 138.

So far as the debtor's original obligation to pay is concerned, the surrender of his matured note for a new note in renewal or extension, raises no presumption that the renewal or extension note shall operate in payment of the debt. *Racine Bank v. Case*, 63 Wis. 504; *Reeder v. Nay*, 95 Ind. 164.

events not a satisfaction.<sup>1</sup> Nor does taking the note or other obligation of a third person amount to payment at all, in any such sense as to exclude evidence to the contrary; for mutual intention remains still the controlling test.<sup>2</sup> And if the third party's obligation thus taken is a check or a note payable presently, conditional rather than absolute payment should be presumed from the transaction; and unless the money be forthcoming, the debtor remains liable as before.<sup>3</sup>

§ 370. **Effect of designating a Place of Payment.** — If a bank be specially designated in a bond or promissory note as the place of payment, the stipulation is imported that its holder will have it at the bank when due, and that the obligor will have there the funds to pay it. And if the debtor be at the bank, at the maturity of the bond or note, with the necessary funds, he so far satisfies the contract that he cannot be made responsible for damages growing out of subsequent delays.<sup>4</sup> But payment made at a different place from that where payment was due is valid.<sup>5</sup>

§ 371. **Application of a Partial Payment.** — Another question of perplexity which comes up in connection with the payment of debts is concerning the application of a partial payment which is voluntarily made by the debtor. In general, when a less sum is paid to the creditor than the whole amount of his demand, it is lawful for the debtor to make the payment as going towards such portion of the total indebtedness as he pleases, and the appropriation should be regarded accordingly. But if the debtor makes no special appropriation of his payment, the creditor may, within a reasonable time and before the relations of the parties have changed essentially, elect to take it as on account of such portion as may please himself.<sup>6</sup> Where neither debtor nor

<sup>1</sup> *Whitcher v. Dexter*, 61 N. H. 91.

<sup>2</sup> Preceding section; *Brigham v. Lally*, 130 Mass. 485; 71 Ind. 58; *McGuire v. Bidwell*, 64 Tex. 43. If right of creditor to demand payment be suspended by a third person's promise, the suspension ceases (*i. e.* right revives) on default of such third

person. *Washington, &c. Bank v. Farmers' Bank*, 4 Johns. Ch. 62.

<sup>3</sup> *Shepherd v. Busch*, 154 Penn. St. 149; 43 Ohio St. 53.

<sup>4</sup> *Ward v. Smith*, 7 Wall. 447.

<sup>5</sup> *Jones v. Perkins*, 29 Miss. 139.

<sup>6</sup> *Roakes v. Bailey*, 55 Vt. 542; 59 N. H. 215; 166 Penn. St. 207.

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creditor makes an appropriation of the payment, the court will do it on principles of equity and justice for them both.<sup>1</sup> The intention of the debtor to appropriate a partial payment in this manner may be indicated as well by the circumstances of the case as by an express direction ; and the same is true likewise of the creditor's assent ; and hence the discretionary power of the court in controversies of this character is never to be arbitrarily exercised.<sup>2</sup>

In justice, if the intent of parties be not clear, the court will therefore apply a payment, where the securities are unequal, to that debt for which the security is the most precarious ; and if one debt is secured but the other is not, to the debt which is not secured.<sup>3</sup> Where, again, the debt bears interest, a partial payment will be applied in keeping down the interest rather than by way of extinguishing the principal ; and as between an interest-bearing debt and a debt bearing no interest the former should be preferred in appropriation. So should payment be presumably intended of a debt due rather than of one not due ; of earlier items in an account current rather than of later ones ; of a legal debt rather than an illegal debt ; and of a several debt rather than a joint debt.<sup>4</sup>

Where an appropriation or application of payment has once been made, it cannot be altered without consent of the parties.<sup>5</sup>

<sup>1</sup> *Alexandria v. Patten*, 4 Cr. 317 ; *Wms. Pers. Prop.* 5th Eng. ed. 115 ; *Hubbard, J.*, in 8 Met. 144 ; *Devaynes v. Noble*, 1 Mer. 608 ; *Brewer v. Knapp*, 1 Pick. 337 ; 45 Wis. 355 ; *Haynes v. Nice*, 100 Mass. 327 ; *Philpott v. Jones*, 2 Ad. & Ell. 41 ; *McDaniel v. Barnes*, 5 Bush, 183 ; *Buster v. Holland*, 27 W. Va. 510. A creditor receiving money with directions to apply part to another creditor's debt cannot keep all to himself. 17 Mass. 575.

<sup>2</sup> *Tayloe v. Sandiford*, 7 Wheat. 13.

<sup>3</sup> *Field v. Holland*, 6 Cr. 8 ; *Backhouse v. Patton*, 5 Pet. 160 ; *Merri-man v. Ward*, 1 John. & H. 371.

<sup>4</sup> *Ib.* ; *Wms. Pers. Prop.* 115 ; *Bower v. Marris*, 1 Cr. & Phil. 351, 355 ; *McDaniel v. Barnes*, 5 Bush, 183 ; *Sprague v. Hazenwinkle*, 53 Ill. 419 ; *King v. Andrews*, 30 Ind. 429 ; 22 Mich. 475 ; 105 Mass. 225 ; 97 Mass. 8 ; *Taney*, 460 ; 59 N. H. 151.

<sup>5</sup> See Bright. Fed. Dig. "Debtor and Creditor," 245, 246. But a creditor's election to appropriate may change, so long as his intention has not been communicated to the debtor. *Simson v. Ingham*, 2 B. & C. 65 ; 6 Gill, 59.

Government may apply the partial payments of its defaulting officers with the same reference to its interests as

One great difficulty found in all controversies over the appropriation of a partial payment, is in determining within what time the privilege of election must be exercised by a debtor or creditor. In general, the period allowed is a reasonable time; but such a statement indicates no precise limit; and this only remains certain, that after a controversy has arisen between the parties, the power to appropriate a past payment is gone from both, and the law must determine the appropriation for them.<sup>1</sup>

§ 372. *Composition or Extension Agreement.* — It was once

a private creditor would. *Jones v. United States*, 7 How. 681.

<sup>1</sup> *United States v. Kirkpatrick*, 9 Wheat. 720.

The subject of payment, and the appropriation of payments, finds incidental consideration in vol. ii. *post*, in connection with the subject of sales. And see *Benj. Sales*, § 746 *et seq.* The result as between buyer and seller is substantially as stated here in the text. Presumptions may be overcome by proof of the facts. Thus, where a debtor has directed payment to be applied to the satisfaction of an invalid or even illegal claim, he cannot afterwards require a different appropriation. *Hubbell v. Flint*, 15 Gray, 550; *Dorsey v. Wayman*, 6 Gill, 59. *Contra*, as to illegal claims. *Kidder v. Norris*, 18 N. H. 532; *Bancroft v. Dumas*, 21 Vt. 456. By express agreement, part-payments may be applicable to instalments not yet due. *Shaw v. Pratt*, 22 Pick. 305. But the creditor alone is not allowed such a discretion. *Bobe v. Stickney*, 36 Ala. 482. A creditor with the right to elect may apply, of course, as a court would have applied, conformably to the text above. See 7 Allen, 270; 8 Allen, 42. See also 58 Me. 59; 47 Mo. 468; 43 Cal. 586. General payments may be applied by a creditor to such debts as are already barred by statutes of limitations or are obnoxious to the

Statute of Frauds. *Haynes v. Nice*, 100 Mass. 327; *Ramsay v. Warner*, 97 Mass. 8. An agent with a demand for himself and also acting for a principal with a demand, must, if he blends the two accounts, apply payment ratably to both demands. *Barrett v. Lewis*, 2 Pick. 123. And money received under instructions to apply in a particular manner is received in trust accordingly. *Libby v. Hopkins*, 104 U. S. 303. And see 101 U. S. 306. The rule that a debtor may appropriate as he pleases applies only to voluntary payments, not to those made by process of law. *Blackstone Bank v. Hill*, 10 Pick. 129. Liens are not to be thus overridden. 59 Miss. 61.

By the Roman law, payment could be made by any one in discharge of the debtor. But as to the common law, *qu.*; and the inclination appears to be to the contrary where payment is made by a stranger to the debtor without the latter's knowledge. *Cook v. Lister*, 13 C. B. n. s. 543; *Walter v. James*, L. R. 6 Ex. 724; *Benj. Sales*, § 756. Otherwise, as to extinguishment by a third person at the debtor's request. 63 Cal. 56. No one can make another his debtor without the latter's express or implied assent. *Alton v. Mulledy*, 21 Ill. 76; *Watkins v. Richmond College*, 41 Mo. 302.

thought that the case where a debtor induced a number of his creditors to accept a compromise amounting to less than their respective demands was one of *nudum pactum*; but the later rule is, as already suggested,<sup>1</sup> that if such a compromise — or rather a composition agreement — be *bond fide* entered into, each creditor acting on the faith of the engagement of the others, it will bind them all; since each has the undertaking of the rest as consideration for his own.<sup>2</sup> And the same may be said of an agreement for extension of time.<sup>3</sup> But engagements of this sort are to be strictly construed; and not only is the debtor bound to fulfil his own stipulations, but each creditor has the right to make his signature expressly conditional, and to insist that such condition be carried out. Those who sign on the faith of other names are released if those names cannot be obtained; while on the other hand, one creditor cannot induce others to sign because he has done so, and then withdraw and leave them bound. The debtor should be in embarrassed circumstances, and should duly have performed or tendered the terms of the composition, in order to render it enforceable by suit.<sup>4</sup>

A secret understanding, by which one creditor is to derive undue advantage from the debtor, in consideration of signing, beyond the just terms expressed in the composition agreement, may render the latter voidable as a fraud upon the

<sup>1</sup> *Supra*, § 366.

<sup>2</sup> *Cumber v. Wayne*, in 1 Smith Lead. Cas. 443; U. S. Dig. 1st series, Debtor and Creditor, 633-714. See *Brown v. Spofford*, 95 U. S. 474; 132 U. S. 318.

<sup>3</sup> *Goode v. Cheeseman*, 2 B. & Ad. 328.

<sup>4</sup> *Alchin v. Hopkins*, 1 Bing. N. C. 99; *Reay v. Richardson*, 2 C. M. & R. 422; *Cutler v. Reynolds*, 8 B. Monr. 596. That consideration is sufficient, one creditor on strength of another, unless the condition be that all creditors shall come into the arrangement, see *Devon v. Ham*, 17 Ind. 472; *Daniels v. Hatch*, 1 Zab. 391; *Doughty v. Savage*, 28 Conn. 146.

That such condition must be complied with, however, if expressed, see *ib.* And see *Gifford v. Allen*, 3 Met. 255. A composition may consist in acts, such as surrendering debts and taking composition notes. *Fellows v. Stevens*, 24 Wend. 294.

And as to an extension agreement, see *Loomis v. Wainwright*, 21 Vt. 520; *Palmer v. Williams*, 13 Gray, 338. An agreement to forbear to sue, if not expressed to be for a stated time, is presumed to intend a reasonable time. 23 Vt. 231.

Concerning what is novation or substitution, see *Bouv. Dict.*; U. S. Dig. 1st series, Debtor and Creditor, 48-58.

other creditors ; yet this case should be distinguished from that where each creditor makes his own bargain and gets the best terms he can.<sup>1</sup> False material representations by the debtor may be shown to vitiate the contract as to creditors ;<sup>2</sup> but not fraud of which the creditor was cognizant at the time of the composition.<sup>3</sup> And at all times it should be remembered that a debtor who is unable to effect a compromise of his debts with his creditors may usually take advantage of the bankrupt or insolvent laws ; and that a single creditor refusing to accede to the proposed composition may force him into legal insolvency, and thus render the agreement with the other creditors worthless.<sup>4</sup>

§ 373. **Demands and Claims.** — Reference should here be added to “demands” and “claims,” — words which, though often lightly used as synonymous with “debts,” take in reality a much wider sweep. For we are to remember that the right to sue and recover money may grow out of a wrong suffered ; not, as in debts proper, out of a contract alone.<sup>5</sup> Our preceding discussion indicates the legal principles which apply to the settlement of all such money rights.

§ 374. **Rules of Set-off; Recoupment, etc., in Modern Practice.** — In modern practice, litigation is frequently simplified by the introduction of rules which permit a person sued upon some debt, claim, or demand, to avail himself in defence of what is known as the right of “set-off,” “recoupment,” or “counter-claim ;” the effect being that the party sued may balance off his own demands against those of the party who sues him, and suffer judgment for the difference only.<sup>6</sup>

<sup>1</sup> Clarke v. White, 12 Pet. 179.

<sup>2</sup> Jackson v. Hodges, 24 Md. 468 ;  
Seving v. Gale, 28 Ind. 486.

<sup>3</sup> Clarke v. White, 12 Pet. 178.

<sup>4</sup> See Wetherell, n. to Wms. Pers.  
Prop. 3d Am. ed. 116 ; 2 Kent, 389.

<sup>5</sup> See Lane County v. Oregon, 7  
Wall. 80 ; 111 U. S. 701. *Semble*, a

tax is included under the larger terms  
used in the text, if not *sui generis*.  
Ib. See §§ 354, 355.

<sup>6</sup> For distinctions between “set-  
off,” “recoupment,” and “counter-  
claim,” see treatise of Waterman,  
2d ed. 1, 426, 476, 608. And see  
Sedgwick on Damages, c. 17.



## CHAPTER IV.

### DEBTS SECURED BY LIEN.

§ 375. **Various Securities for Debt enumerated.**— Keeping the general definition of a debt in view, let us now examine in order the various securities for a debt ; with this general observation at the outset, that while the name usually applied to each species of property is the name of the security alone, the property in fact consists of that incorporeal thing called a debt, and a security besides by way of better enforcing its payment. “There are,” to use the recent words of an eminent English judge with reference to personal property, “three kinds of security : the first, a simple lien ; the second, a mortgage passing the property out and out ; the third, a security intermediate between a lien and a mortgage, — viz., a pledge, — where by contract a deposit of goods is made a security for a debt and the right to the property vests in the pledgee so far as is necessary to secure the debt.”<sup>1</sup>

We shall consider in this and the two following chapters the lien, the pledge, and the mortgage accordingly ; thus adopting judicial indications and the most natural order of progression.

§ 376. **What is a Lien.** — A lien, in general language, may be defined as that hold or claim which one person has upon the property of another as a security for some debt or demand due him. The right of a person to hold property by lien lasts in theory until the debt or demand so secured has been satisfied ; it is not incompatible with a right on his part to sue for the same debt or demand ; but the lien constitutes a collateral security, more available often than the debt itself, and certainly a ready means of enforcing payment, so long as the property held by lien is worth anything.<sup>2</sup> The goods,

<sup>1</sup> See Willes, J., in *Halliday v. Holgate*, L. R. 3 Ex. 302.

<sup>2</sup> Bouv. Dict. “Lien ;” *Somes v. British Empire Shipping Co.*, 8 H. L.

while they continue in possession of a person entitled to a lien, cannot be seized in execution for the real owner's debt.<sup>1</sup> And a lien is found available even where the debt for which the creditor claims to hold the goods is of more than six years' standing, and the remedy by action at law is barred by the Statute of Limitations. But the title to property held by lien, so far as the common law recognizes it, and irrespective of all statute remedies, is quite imperfect; for the mere right of lien is not understood to carry with it any right of sale to secure indemnity.

And hence we say that there is a progression from liens to pledges, in the matter of title; for the contract of pledge carries an implied understanding, at least, that the security shall be made effectual to discharge the obligation; while in the case of a lien nothing is given, unless under special circumstances, but the right of retaining or detaining the property which serves as security.<sup>2</sup> Whenever, indeed, the sum for which the lien attaches is paid up, the lien is gone. A lien, too, attaches as something incidental to the debt or demand; and usually by mere act of the law without any act of the party.<sup>3</sup> Yet so many kinds of liens exist, besides the mere common-law lien, that, as we shall see in the course of this chapter, the word "lien" has acquired quite an extensive and rather a vague legal significance.

§ 377. **Various Kinds of Liens stated.**—There are many kinds of liens recognized at law, some of which attach to real estate alone, some to certain kinds of personal property alone, and some to property in general. And, in a large and rather indefinite sense, we are accustomed to speak of the *equitable lien*, a creature of equity; of the *maritime lien*, which constitutes an important feature of the jurisprudence of shipping; of the *statutory lien*, a designation applied to liens either expressly conferred or largely regulated by statute; besides the *common-law lien*, which is the primitive lien in its simplest

Cas. 338; *Oakes v. Moore*, 24 Me. 214; *Montagu Liens*, 1.

<sup>1</sup> *Legg v. Evans*, 6 M. & W. 36; *Smith Merc. Law*, 553.

<sup>2</sup> *Spears v. Hartly*, 3 Esp. 81; *Higgins v. Scott*, 2 B. & Ad. 413.

<sup>3</sup> *Story Bailm.* § 311; *Holt N. P.* 383; *Doane v. Russell*, 3 Gray, 382; 2 *Kent Com.* 642.

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form, — that lien which consists in a mere legal right to retain possession until the debt or charge is paid. For as to these equitable, maritime, and statutory liens, they often seem to be more nearly synonymous with preferred or privileged claims, whose payment is charged upon the property, with adequate means for its enforcement.

§ 378. **Common-Law Lien; Particular and General Lien.** — To confine ourselves more particularly, for the present, to the common-law lien, we observe that there are two leading species of liens known to the law; namely, *particular* liens and *general* liens. A particular lien on another's property is the right to retain it for a debt which arises on account of labor employed or expense bestowed upon that identical property. The right rests on principles of natural justice and sound policy; and it not only prevents circuity of action, but goes far towards obviating the necessity of any suit at all in matters which must often be too trivial and annoying to bear litigation; thus positively favoring the trade of the poor man, though confined at this day to no class of business exclusively. Particular liens have therefore long been decidedly favored in law.

Not so, however, with the general lien, which is a right to retain another's property for a general balance of account.<sup>1</sup> Of course, where a general lien exists, a particular one is by necessary implication included.

§ 379. **Who may be entitled to a Particular Lien.** — Chancellor Kent tells us that where a person, from the nature of his occupation, is under an obligation, according to his means, to receive and be at trouble and expense about the personal property of another, he has a particular lien upon it; and that our law has given this privilege to persons concerned in certain trades and occupations which are necessary for the accommodation of the public. Upon this ground, he adds, common carriers, innkeepers, and farriers had a particular

<sup>1</sup> See 2 Kent Com. 634; *per* Heath, Me. 214; *Bank of Washington v. J.*, 3 B. & P. 494; *Hammonds v. Nock*, 9 Wall. 382; *Lickbarrow v. Barclay*, 2 East, 227; *Wilson v. Guyton*, 8 Gill, 213; *Oakes v. Moore*, 24

*Mason*, 6 East, 21, *n.*

lien at the common law ; for they were obliged to serve the public to the utmost extent and ability of their employment, and if they refused without adequate reason were liable to an action.<sup>1</sup>

Now, examining this right of lien in the light of remuneration for the obligations imposed by law upon the lien-claimant, as thus suggested, we find that there are limits worthy of notice. Take the case of an innkeeper, for instance. Many of the decisions under this head turn upon the distinction taken between innkeepers and keepers of lodging or boarding houses, in respect of liability for the goods of the guest ; and while, in the former instance, a very strict rule of responsibility has been enforced from the earliest times, there seems little, if anything, short of actual ordinary negligence, so to speak, for which in the latter instance one is made answerable.<sup>2</sup> Not to follow out this distinction, we conclude that, by strict reasoning, the innkeeper's right of lien on the goods of his guest does not, at the common law, extend to boarding-house or lodging-house keepers. But a similar right is expressly conferred on the latter class of persons by the statutes of New York and other States.<sup>3</sup> This lien of an innkeeper extends only to the goods or property of his guest, which he received on the faith of the innkeeping relation.<sup>4</sup> And he cannot detain his guest or strip him of his clothes in order to secure payment of his bill ; for the lien does not extend to the person of his guest, and stripping a man of his clothes amounts virtually to imprisonment.<sup>5</sup>

<sup>1</sup> 2 Kent Com. 634 ; *Lane v. Cotton*, 12 Mod. 484 ; *Carlisle v. Quattlebaum*, 2 Bailey, 452.

<sup>2</sup> *Holder v. Soulby*, 8 C. B. n. s. 252 ; *Dansey v. Richardson*, 3 Ell. & B. 144 ; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 423 ; *Manning v. Wells*, 9 Humph. 746 ; *Sibley v. Aldrich*, 33 N. H. 553 ; *Chamberlain v. Masterson*, 26 Ala. 371. And see *Schoul. Bailm.* §§ 273-329.

<sup>3</sup> See *Preston v. Neale*, 12 Gray, 222 ; N. Y. Laws 1860, p. 771 ; 2 Kent Com. 592-594 ; *Story Bailm.*

§§ 478, 481 ; *Schoul. Bailm.* § 329 ; *Cross v. Wilkins*, 43 N. H. 332 ; *Nichols v. Holliday*, 27 Wis. 406.

The precise language of a local statute is material on this point. *Mills v. Shirley*, 110 Mass. 158.

<sup>4</sup> *Schoul. Bailm.* §§ 326-328, and cases cited.

<sup>5</sup> *Sunbolf v. Alford*, 3 M. & W. 248. A statute exempting certain property from execution does not abrogate an innkeeper's lien. 47 Iowa, 501.

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Next we come to the carrier's lien. That common carriers have a lien on the goods they carry is a familiar principle, not confined to such persons as in former days managed a petty business of this sort, but extended, with the modern development of trade and commerce, to that immense transportation business which is done in modern times by railways and express companies on land and by ships and steam vessels by water. For in these cases the liability imposed by law is to deliver safely, excepting perils which occur by act of God and a public enemy; to which exceptions we may add act of customer and act of public authority.<sup>1</sup> The lien of a common carrier covers the goods he carries; and unless he has made a special contract to deliver them up before he has been paid, he is not obliged to do so.<sup>2</sup> The carrier's lien covers his advances to others for freight and storage on the goods; but does not extend to former freight unpaid him, nor to other indebtedness of his customer,<sup>3</sup> nor to overcharges, nor to acts performed entirely outside the scope of the carriage contract.<sup>4</sup> The common carrier of passengers has also a lien upon the passenger's baggage for his fare, but not upon the person of the passenger.<sup>5</sup> Here, too, we find that the common-law lien affords some recompense for the extraordinary liability of the lien-claimant.

§ 380. *The Same Subject.* — But, however this particular lien may have originated, it is found in modern times projected far beyond that class of persons who at the common law had to receive the goods offered because of the public nature of the employment, without freedom to discriminate.

<sup>1</sup> Schoul. Bailm. § 405, *et seq.*

<sup>2</sup> 2 Kent Com. 611, 634-642; Story Bailm. § 588, 8th ed.; Schoul. Bailm. §§ 542-550; 2 Ld. Raym. 752; 2 Redf. Railw. 3d ed. 156 *et seq.*

<sup>3</sup> *Ib.*; Bissel v. Price, 16 Ill. 408; Briggs v. Boston, &c. R. R. Co., 6 Allen, 246; Adams v. Clark, 9 Cush. 215; 1 Grant Cas. 139.

<sup>4</sup> Steamboat Virginia v. Kraft, 25 Mo. 76; Richardson v. Rich, 104 Mass. 156. And see Schoul. Bailm.

§§ 542-550, where this subject is examined at length. The lien extends sometimes to extraordinary expenses incurred in the transit with respect to the property. And see L. R. 6 Q. B. 776; Hingston v. Wandt, 1 Q. B. D. 367.

<sup>5</sup> Wolf v. Summers, 2 Campb. 631; McDaniels v. Robinson, 26 Vt. 316; Story Bailm. § 604; Schoul. Bailm. § 693; 104 Mass. 117.

The general rule now is, that every bailee for hire, who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his reasonable charges.<sup>1</sup> This includes all persons who take property in the way of their trade or occupation to bestow labor or expense upon it: as, for instance, tailors, dyers, millers, lard renderers, wharfingers, and warehousemen, to whom may be added auctioneers; though none of these are obliged to accept employment from any one that offers it. Nor is the lien a privilege for regular occupations of hired bailment only, but it is inferable commonly at this day from the relation of hired service about a thing wherever that relation is created.<sup>2</sup> And the lien extends to the whole of one entire work upon one entire subject.<sup>3</sup> It is even held that one who trains and keeps a race-horse has a lien; for by his instruction he has wrought an essential improvement in the animal.<sup>4</sup> Yet neither the keeper of a livery-stable nor a cattle-keeper has, as such, a common-law lien on an animal delivered to him for keeping, without a special agreement to that effect; though this exception as to agistors, so called, is a discreditable one to our law; and in fact in modern times a lien is quite generally given such persons by statute in the various States.<sup>5</sup> This common-law lien is the right of the responsible bailee who performs the service for the bailor and receives the thing into custody; it cannot be claimed by the bailee's sub-agent, laborer, or other person in privity with him alone.<sup>6</sup>

Some of the cases decided seem to turn upon custom; and

<sup>1</sup> 2 Kent Com. 536, 627, 635; Grinnell v. Cook, 3 Hill (N. Y.), 485; Green v. Farmer, 4 Burr. 2214; Close v. Waterhouse, 6 East, 523; Hanna v. Phelps, 7 Ind. 21; Schoul. Bailm. §§ 122-127.

<sup>2</sup> Schoul. Bailm. § 122; Story Bailm. § 440.

<sup>3</sup> *Ib.*; Morgan v. Congdon, 4 Comst. 551.

<sup>4</sup> Forth v. Simpson, 13 Q. B. 680; 58 N. H. 64.

<sup>5</sup> Wallace v. Woodgate, 1 C. & P. 575; Grinnell v. Cook, 3 Hill, 485;

Richards v. Symonds, 10 Jur. 6. See 2 Kent Com. 636. As to the hired bailee's lien, see Schoul. Bailm. §§ 122-127, at length, and cases cited. Possibly the expense naturally involved in keeping an animal by virtue of a lien, where the right to sell did not follow, was an argument against presuming this lien to have existed.

<sup>6</sup> Hollingsworth v. Dow, 19 Pick. 228; Jacobs v. Knapp, 50 N. H. 71. Statute may confer such right. See 132 U. S. 220.

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the business usage of a locality might carry the rule of particular liens even further than the courts have as yet clearly sanctioned its application, so desirable and so reasonable is this privilege found to be. Doubtless, moreover, the mutual agreement of parties may in these days create such a lien. But the rule has its limits, notwithstanding.<sup>1</sup> It was formerly thought that the lien for labor and skill imparted was inconsistent with a special stipulation beforehand concerning the price; but this is no longer law; and the regulation of price does not affect this right of lien, unless, indeed, the special agreement be so expressed as to be inconsistent with the supposition that a lien was intended; as in the case where some future time of payment is fixed.<sup>2</sup> For a particular lien may be created or destroyed at pleasure by agreement of the parties, and it is inconsistent with business dealings clearly upon credit.

§ 381. **Whether a Particular Lien may exist, irrespective of Contract.**—Particular liens may not only be created by express contract, but they are even implied where, from the circumstances connected with a particular transaction or from the peculiar relation of the parties, it is fair to give the law that operation, inasmuch as compensation with reference to the thing, was fair to bestow.<sup>3</sup> And, hence, although the finder of lost property on land has no right at common law corresponding to what in maritime law we denominate “salvage,” and cannot claim a lien for taking care of lost property for the loser, yet if the loser promise a reward in express language either to a particular person, or generally to any one who will return it, the finder has a lien upon the property for his reward. Yet, where there is no clear promise of a reward on the loser’s part, the finder must give

<sup>1</sup> *Goodrich v. Willard*, 7 Gray, 183; *Miller v. Marston*, 35 Me. 153; 37 Iowa, 436. Thus, while one who runs a saw-mill has a lien on the lumber for sawing it into boards, another who removed the timber from some person’s land, at an agreed price and for the purpose of having it sawed, may have no lien at all.

*Oakes v. Moore*, 24 Me. 214; *Morgan v. Congdon*, 4 Comst. 551. And see next section.

<sup>2</sup> 2 Kent Com. 635; *Blake v. Nicholson*, 3 Maule & S. 168; *Burdick v. Murray*, 3 Vt. 302.

<sup>3</sup> See *Wentworth v. Day*, 3 Met. 352.

up the property, suing afterwards, if he so choose, for his reasonable recompense.<sup>1</sup> For the salvage of vessels compensation is granted irrespective of contract or an owner's consent, and there is a lien of the maritime kind.<sup>2</sup>

A lien can never arise, however, from one's own wrong, beyond an estoppel; as, for instance, upon certificates of stock held through a breach of trust.<sup>3</sup> Nor can an owner in general be deprived of his property without his knowledge and assent personally or through his agent.<sup>4</sup> Upon the authority of a *dictum* of Lord Chief Justice Holt, however, it was once held that a carrier who receives goods from a wrong-doer or thief may detain them against the true owner until the carriage is paid; the assumption being, of course, that the carrier is free from all guilty connivance.<sup>5</sup> In some parts of this country this latter doctrine is doubtless repudiated; for it is held in several late cases that even an innocent carrier, receiving goods from a wrong-doer, has no lien thereon against the rightful owner for freight; not even for freight paid by him to a previous carrier whom the owner had directed to carry them, nor indeed such right to recompense at all.<sup>6</sup> This might appear at first sight inconsistent with the doctrine favored by some of the "innkeeper" cases; and certainly there is an English decision sustaining the innkeeper's right of lien on a horse which a guest puts into his stable, whether the animal be the property of the guest or of some third person from whom it was stolen; so

<sup>1</sup> 2 Kent Com. 636; *Nicholson v. Chapman*, 2 H. Bl. 254; *Wentworth v. Day*, 3 Met. 352; *Wilson v. Guyton*, 8 Gill, 213. That a finder, as such, has no lien, though entitled to remuneration, see *Preston v. Neale*, 12 Gray, 222; 52 Penn. St. 584.

<sup>2</sup> §§ 329, 330.

<sup>3</sup> *Randel v. Brown*, 2 How. 406.

<sup>4</sup> There must, as a rule, be privity or contract relation, express or implied, between the bailee and bailor, in order to enforce a lien against the latter. *Gross v. Eiden*, 53 Wis. 543. And see *Oakes v. Moore*, 24 Me. 214;

*Morgan v. Congdon*, 4 Comst. 551; *Small v. Robinson*, 69 Me. 425.

<sup>5</sup> See 2 Ld. Raym. 866, citing case of the Exeter carrier.

<sup>6</sup> *Clark v. Lowell, &c. R.*, 9 Gray, 231; *Stevens v. Boston & Wor. R.*, 8 Gray, 262; *Waugh v. Denham*, 16 Irish C. L. 406; *Schoul. Bailm.* § 544. See *King v. Richards*, 6 Whart. 418. Nor can one who has carried a thing for the sole convenience of the mere hirer thereof, and at his request, acquire a lien upon the property available against the owner. *Gilson v. Gwinn*, 107 Mass. 126.



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long, of course, as the innkeeper acts innocently in the matter.<sup>1</sup> But this distinction may appear, on reflection, to aid the investigation: that, in this latter instance, the property is benefited by the expense put upon it; while in the case of a carrier who diverts property from the true owner, however innocently, there is enough hinderance occasioned the owner by the wrongful transportation to a distance of the goods, without his being compelled to pay for their freight besides.

A lien which might not be asserted against a non-assenting true owner might nevertheless be good as against the person who left the thing; for the latter ought not to assert his own wrong.<sup>2</sup> So, too, it should prevail against any wrongful dispossessor of the carrier,<sup>3</sup> or even where the owner was himself at fault in the bailment.<sup>4</sup>

§ 382. **General Lien; who may acquire.**—A general lien differs essentially from a particular lien in this: that while the latter is a right which grows out of expense or services bestowed upon the particular property, the former is a right to retain certain property of another on account of some general balance due from the owner. A general lien, therefore, carries the preference of creditors so far as to interfere materially with equal opportunities for attaching and the equal distribution of an insolvent's effects; hence it receives no great favor at the law.<sup>5</sup> The very suggestion of a general balance leads to an inquiry whether the lien covers a general balance on all dealings between the parties, or only a general balance on the work done in that particular course of business; a question which we do not find decisively answered, though reason suggests that the latter is always the preferable interpretation in case of doubt. Thus, it has been ruled that, while a policy broker may have a general lien for his policy business, the lien cannot extend to other debts due

<sup>1</sup> *Yorke v. Grenaugh*, 2 Ld. Raym. 866. And see *Snead v. Watkins*, 37 E. L. & Eq. 384; *Threfall v. Borwick*, L. R. 7 Q. B. 711; *Domestic Sewing Machine Co. v. Watters*, 50 Ga. 573; 3 Starkie, 172.

<sup>2</sup> Schoul. Bailm. § 544.

<sup>3</sup> *Ames v. Palmer*, 42 Me. 197.

<sup>4</sup> *Briggs v. Boston R.*, 6 Allen, 246.

<sup>5</sup> 2 Kent Com. 636; *Rushforth v. Hadfield*, 6 East, 519; s. c. 7 East, 224; 3 Bos. & P. 494.

him from the owner of the property.<sup>1</sup> Custom has much to do in establishing the right to a general lien; and upon such custom as justifies the inference of a mutual agreement, or else upon express contract, a general lien should always be based.<sup>2</sup> Hence it is that calico printers, fullers, and perhaps dyers, have a general lien by the English decisions; while in that country a wharfinger is allowed not only a lien on particular goods deposited at his wharf, but by the general usage of his trade the right to retain them for such general balance of his account as may be due from the owner.<sup>3</sup>

Insurance brokers are certainly, both in English and American courts, allowed a general lien.<sup>4</sup> Clerks of courts, too, have a general lien on the papers in their hands, for their fees.<sup>5</sup> Bankers have a general lien on the securities of their customers which come incidentally to their hands in course of their general business for their general balance; though this is a right, as in other cases, subject to regulation by statute or charter or usage;<sup>6</sup> and our national banks have, as it is held, no lien upon the stock for their loans to a stockholder.<sup>7</sup> A usage between two banks makes a lien on a balance which has been suffered to remain upon the faith of their mutual dealings; the rule not being confined necessarily to the advance of money by the bank.<sup>8</sup>

<sup>1</sup> *M'Kenzie v. Nevius*, 22 Me. 138; *Olive v. Smith*, 5 Taunt. 57. And see *Weldon v. Gould*, 3 Esp. 268.

<sup>2</sup> *Jarvis v. Rogers*, 15 Mass. 389; *Story Agency*, § 355.

<sup>3</sup> *Weldon v. Gould*, 3 Esp. 268; *Saville v. Barchard*, 4 Esp. 53; *Spears v. Hartly*, 3 Esp. 81.

<sup>4</sup> *M'Kenzie v. Nevius*, 22 Me. 138; *Olive v. Smith*, 5 Taunt. 57; *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268; *Castling v. Aubert*, 2 East, 325; *Story Agency*, § 379.

<sup>5</sup> *Farewell v. Coker*, 2 P. Wms. 460; *Taylor v. Lewis*, 3 Atk. 727.

<sup>6</sup> 2 Kent Com. 641; *Barnett v. Brandos*, 5 M. & Gr. 630; *Davis v. Bowsher*, 5 T. R. 488; *Story Agency*, § 380. And see *Case v. Bank*, 100 U. S. 446. A general banker has no

implied lien upon securities deposited with him for gratuitous safe keeping only. *Leese v. Martin*, L. R. 17 Eq. 224; *Brandao v. Barnett*, 12 Cl. & F. 787. Nor where securities are accidentally in possession of the bank, or not in its possession in the course of its business as such, or where the circumstances of its possession (as in case of a particular pledge) are inconsistent with such general lien. *Reynes v. Dumont*, 130 U. S. 354. But *semble*, if deposited on hire for a special purpose, a particular lien would be created accordingly. Special contract may, of course, exclude as well as confer a general lien. *Story Agency*, § 381; *post*, § 384.

<sup>7</sup> *Bank v. Lanier*, 11 Wall. 369.

<sup>8</sup> *Bank of Metropolis v. New Eng-*

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§ 383. **General Lien of Attorneys and Factors.**—The kinds of general lien with which we are most familiar are those of attorneys and factors. It is well settled, both in England and this country, that attorneys and solicitors have a general lien, originating in common law, upon the papers of their clients in their possession for the general balance of their professional accounts.<sup>1</sup> And besides this lien on papers, they have a lien on the moneys recovered in a particular action; this, however, being more readily presumed a particular lien, while that upon the papers is a general lien. Yet the attorney's particular lien on the moneys collected in a suit receives a pretty liberal construction in the later cases; and it is allowed to protect not only fees and disbursements in that suit, but also in any suit or proceeding brought to recover other moneys covered by the same retainer.<sup>2</sup> A lien on the judgment procured by an attorney is also recognized on broad equitable principle without requiring any strict possession.<sup>3</sup> Whatever be the fate of a suit, the client cannot get back the papers without paying or securing what is due his attorney, not only in respect of that business for

land Bank, 1 How. 234. A check drawn upon a bank for more than the amount of the drawer's funds on deposit creates no lien in favor of the payee upon the actual balance, until the bank has agreed to pay it *pro tanto*. *Dana v. Third Nat. Bank*, 13 Allen, 445.

<sup>1</sup> *Wilkins v. Carmichael*, 1 Doug. 104; *Lickbarrow v. Mason*, 6 East, 21 n.; *Dennett v. Cutts*, 11 N. H. 163; 2 Kent Com. 641; 7 Vin. Abr. 74; *Ex parte Sterling*, 16 Ves. 258; *In re Paschal*, 10 Wall. 483; *Balsbaugh v. Frazer*, 19 Penn. St. 95. See Story Agency, 9th ed. § 383; *In re Knapp*, 85 N. Y. 284, and cases cited. As to lien where employment is by the State, see 38 Ark. 385, 601.

<sup>2</sup> See 2 Kent Com. 641; *Pope v. Armstrong*, 3 Sm. & M. 214. And see *In re Knapp*, 85 N. Y. 284. In

this country, it may be observed, the distinction between attorney or solicitor and counsel, which has been so sedulously maintained at the English bar, is practically abolished in nearly all the States, and every lawyer in charge of a case acts both as solicitor and counsel. See *Hutchinson v. Howard*, 15 Vt. 544; *In re Paschal*, 10 Wall. 483.

Where the attorney is paid or well secured otherwise for his claim, as by payment into court, he cannot embarrass further the client by detaining important papers. *Galland, Re*, L. R. 31 Ch. D. 296. See in detail as to attorney's lien, *Jones Liens*, § 113 *et seq.*

<sup>3</sup> This appears analogous to a maritime or equitable lien. Some States recognize it in practice and some do not. *Jones Liens*, § 153 *et seq.*

which he left them, but for all professional services remaining unpaid. It would, of course, be unreasonable to compel a client to continue to employ an attorney who proves unworthy; and, in fact, neither is he obliged to do so, nor is an attorney bound to conduct the suit for which he is engaged after he has seen fit to terminate his engagement for reasonable cause and upon reasonable notice; but, for all that, the attorney may recover for his costs, services, and expenses for the period during which he was employed.<sup>1</sup> No collusive settlement made between clients can deprive the attorney of his lien; nor can the losing party in a suit settle safely with the winning party without regarding this lien, as he is frequently tempted to do.<sup>2</sup>

A factor, unlike a broker selling in the name of his principal<sup>3</sup> and without possession of the property, buys and sells either in his own or his principal's name; and factors have not only a particular lien (as all do who have a general lien besides), but a general lien also for the balance of their general account,<sup>4</sup> upon all the goods of the debtor which

<sup>1</sup> 2 Kent Com. 641, *n.*; Rowson v. Earle, 1 Moody & M. 538; *In re Paschal*, 10 Wall. 483.

<sup>2</sup> Ormerod v. Tate, 1 East, 464. The attorney's lien is not confined to moneys recovered for his client by judgment; nor by the fact that the moneys were received on behalf of an estate where his client was executor. *In re Knapp*, 85 N. Y. 284. The attorney's lien extends to a general balance of accounts for professional services. 87 N. Y. 521, 550; 66 Ala. 29. As to the case of a set-off of one execution against another between the same parties, see *Ocean Ins. Co. v. Rider*, 22 Pick. 210. The attorney's lien for costs in a suit extends perhaps to judgments recovered by him. See *Vaughan v. Davies*, 2 H. Bl. 440, where qualifications are stated; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368. And see *Casey v. March*, 30 Tex. 180; *Forsythe v. Beveridge*, 62 Ill. 268.

But an attorney has no such lien in a cause before judgment as to prevent his client from settling the action with the opposite party. *Simmons v. Almy*, 103 Mass. 33; *Wright v. Wright*, 70 N. Y. 96. Nor does his lien upon papers protect their non-production at a trial. *Fowler v. Fowler*, 29 W. R. 800.

See further, for a liberal construction of the attorney's lien, *Dowling v. Eggemann*, 47 Mich. 171; *Porter v. Hanson*, 36 Ark. 591. Counsel or associate counsel fees may thus be protected by the attorney. *Jackson v. Clopton*, 66 Ala. 29. This lien may extend to the proceeds of real estate, as under an execution sale to satisfy a judgment.

<sup>3</sup> A broker has no right of general lien. See 46 Md. 59.

<sup>4</sup> See, particularly, as to the factor's general lien, *Story Agency*, 9th ed. § 377 *et seq.* See also *Jones Liens*, § 418 *et seq.* Commission

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remain in their hands in this capacity. The lien extends even to the price of the goods which one has sold as factor, though he has parted with their possession; and he may enforce payment from the buyer himself against the principal.<sup>1</sup> It may extend to all sums for which he has become liable for his principal as surety or otherwise; by virtue of his relation.<sup>2</sup> The doctrine of lien applies as well to purchasing as to selling factors. And usually the factor's lien is good even as against attaching creditors; while if he has sold part of the goods, he is entitled to a lien upon the residue for his expenses, advances, and commissions.<sup>3</sup> But the general lien, in such a case, applies only to goods received by a factor as such; and to give him a lien upon goods consigned to and not actually received by him, the consignment ought to be to him in terms, and he should have made advances or given acceptances on the faith of it.<sup>4</sup> The modern business of brokers is not so strictly limited as formerly; and, at all events, a broker has a specific lien for his charges when he has such possession of the property that he can exercise the right.<sup>5</sup>

§ 384. **General Lien by Express Agreement.**—A general lien, like a particular lien, may arise by express agreement of the parties.<sup>6</sup> A familiar instance of this rule is afforded in the case where one entitled to a particular lien gives notice that he will receive no goods for the purpose of his

merchants who have advanced on goods of a principal insured by them have a lien on the insurance money in case of accidental fire. *Johnson v. Campbell*, 120 Mass. 449. And see *Brown v. Coombs*, 63 N. Y. 598; *Burrus v. Kyle*, 56 Ga. 24; 26 La. Ann. 22. A lien cannot be asserted by a factor by way of fraudulent preference under bankrupt acts. *Nudd v. Burrows*, 91 U. S. 426; *Copeland v. Stein*, 8 T. R. 190.

<sup>1</sup> *Story Agency*, §§ 34, 377; 2 Kent Com. 640, and cases cited; *Dixon v. Stansfield*, 10 C. B. 398; *Knapp v. Alvord*, 10 Paige, 205;

*Brander v. Phillips*, 16 Pet. 129. See *Houghton v. Matthews*, 3 Bos. & P. 485.

A factor's particular lien for advances is often recognized by local statute. 137 U. S. 234.

<sup>2</sup> *Story Agency*, § 376; *Hidden v. Waldo*, 55 N. Y. 294; *Hammond v. Barclay*, 2 East, 227.

<sup>3</sup> *Bryce v. Brooks*, 26 Wend. 367; *Sewell v. Nichols*, 34 Me. 582. But see *Gray v. Bledsoe*, 13 La. 489.

<sup>4</sup> See *Davis v. Bradley*, 28 Vt. 118.

<sup>5</sup> *Barry v. Boninger*, 46 Md. 59; *Jones*, § 420.

<sup>6</sup> See *supra*, § 380.

business, except on condition that his lien shall include both charges on the particular goods and for the general balance of his account; which notice, being brought to the knowledge of parties dealing with him afterwards, will affect their liabilities accordingly.<sup>1</sup> Carriers and innkeepers frequently try to limit their own responsibilities and sometimes to increase their lien security by general notice; but the courts are not readily disposed, in the latter instance at least, to concede to their wishes.<sup>2</sup> As to cases of lien by express contract, it may be generally observed that direct words or stipulations inconsistent with any other understanding of the parties suffice for creating it; but every lien which is founded upon agreement must be in just conformity to the agreement, and is not to be extended further by construction.<sup>3</sup>

A general lien by custom or business usage, such as we have above noticed, appears, when closely examined, to be in truth that of an implied contract founded upon the custom. And so free are parties to regulate this subject by an express contract, whether the effect be to control a business usage or not, that they may either create a lien or exclude the lien which otherwise would operate. The mere existence of a special agreement will not, however, of itself exclude the right of lien; but if any of its terms be inconsistent with this right, it will do so.<sup>4</sup> Parties have lawful power to deal as they please with their own property, and it only remains for them to make their mutual understanding plain in any particular case. But it may be added that the words "lien," "pledge," and "mortgage," are often used carelessly and interchangeably with reference to personal property; and some have thought that, properly speaking, this lien by contract,

<sup>1</sup> See *Kirkman v. Shawcross*, 6 T. R. 14; *Gladstone v. Birley*, 2 Mer. 401.

<sup>2</sup> 2 Kent Com. 637, commenting on *Oppenheim v. Russell*, 3 Bos. & P. 42; *Rushforth v. Hadfield*, 7 East, 224; *Ang. Carriers*, § 357 *et seq.*; *Schoul. Bailm.* § 548; *Adams v. Clark*, 9 Cush. 215.

<sup>3</sup> Cases *supra*; also, *Bank of Washington v. Nock*, 9 Wall. 373; *Raitt v. Mitchell*, 4 Campb. 146; *Ex parte Langston*, 17 Ves. 231.

<sup>4</sup> *Smith Merc. Law*, 8th ed. 555, 556; *Chase v. Westmore*, 5 M. & S. 180.

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as we call it, is rather to be presumed as in the nature of an agreement for a pledge, than as intended for a mere lien.<sup>1</sup>

§ 385. **Lien, how made and kept sure ; Possession necessary.** — Having thus considered the various kind of liens known to the common law, we next inquire what steps are necessary to make and keep the lien strong and sure. In every case, then, a delivery of the property is essential, in order that there may be a lien upon it ; by which is meant that the goods must have come into the rightful possession of the lien-claimant or his agent.<sup>2</sup> It is true that this possession by the lien-claimant may be actual or constructive ; but the right of lien is the right to retain what one already has in his keeping, and where there is no possession there can be no lien. Furthermore this possession of the goods must have been rightfully obtained ; for a creditor cannot wrongfully seize upon his debtor's goods, and then claim to hold them by virtue of a lien ; nor, if an agent delivers the property without due authority from his principal, can a lien thereby arise.<sup>3</sup> But liens may undoubtedly be acquired through the acts of agents acting within the scope of their employment.<sup>4</sup> And it is held that an excessive claim for a proper kind of lien — there being nothing improper claimed except the amount — will not invalidate the lien as to the amount justly due.<sup>5</sup>

But if possession is thus essential to the creation of a lien, it is no less necessary to its continued existence. And whenever the party voluntarily parts with the possession of the goods on which he has a lien, the lien is lost and cannot be reasserted on merely regaining them.<sup>6</sup> So strict is this rule and the requirement that the lien-claimant shall consistently

<sup>1</sup> See Sir Wm. Grant in *Gladstone v. Birley*, 2 Mer. 404 ; *Gibbs, C. J.*, in *Wilson v. Heather*, 5 Taunt. 642. But the indiscriminate use of the term "lien" is too strongly established, for trying thus to restrain the word to a right arising by mere operation of law. *Story Agency*, § 356 ; 4 M. & W. 278.

<sup>2</sup> *Houghton v. Matthews*, 3 Bos. & P. 485 ; 2 Kent Com. 638 ; 3 T. R.

119 ; *M'Combie v. Davies*, 7 East, 5 ; *Kollock v. Jackson*, 5 Ga. 153.

<sup>3</sup> See 2 Kent Com. 638, 639 ; *Story Agency*, § 381 ; *M'Combie v. Davies*, 7 East, 5.

<sup>4</sup> *Ib.*

<sup>5</sup> *Allen v. Smith*, 12 C. B. n. s. 638 ; *Busfield v. Wheeler*, 14 Allen, 139.

<sup>6</sup> *Perkins v. Boardman*, 14 Gray, 481 ; *Sch. Bailm.* §§ 123, 327, 545.

maintain that character, that if the lien-claimant cause the goods to be taken in execution in his own suit and buy them in afterwards, the nature of his possession is so changed that the lien is lost, although the property never left his premises.<sup>1</sup> The question what amounts to a complete divestment of possession in such cases depends mainly upon the intention of such divestment of possession, for it is voluntary and not involuntary relinquishment which puts an end to the lien; though wrongful acts of the possessor might operate to the same end upon his parting with possession.<sup>2</sup> Moreover, one may, by words and behavior, be estopped from asserting a lien as against third parties whose action he has thereby influenced, even where the dispossession may not be complete as against the debtor alone.<sup>3</sup> But if the assignment or deliv-

<sup>1</sup> *Jacobs v. Latour*, 5 Bing. 130. See 2 Kent Com. 639; *Smith Merc. Law*, 8th ed. 559; *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268; *Stickney v. Allen*, 10 Gray, 352.

<sup>2</sup> Schoul. Bailm. §§ 123, 545; 58 Penn. St. 414; *Davis v. Bigler*, 62 Penn. St. 242; *Robinson v. Larrabee*, 63 Me. 116; *Tucker v. Taylor*, 53 Ind. 93. An innkeeper's lien is not lost merely by his guest's occasional absence. *Allen v. Smith*, 12 C. B. n. s. 638. Nor because of his being fraudulently dispossessed of the effects. *Manning v. Hollenbeck*, 27 Wis. 202. Cf. *Perkins v. Boardman*, 14 Gray, 481. And see 48 L. T. n. s. 863. A common carrier's lien is not lost by the procurement of a false and fraudulent delivery. *Bigelow v. Heaton*, 6 Hill, 43; *The Bird of Paradise*, 5 Wall. 545; *Mors Le Blanch v. Wilson*, L. R. 8 C. P. 227. Relinquishment of the carrier's lien is not readily presumed, but it may be shown. Schoul. Bailm. §§ 545, 546; *Angell Carriers*, § 374. The lien is not necessarily relinquished by taking special security for payment of the debt. *Angus v. McLachlan*, 48 L. T. n. s. 863.

<sup>3</sup> *Blackman v. Pierce*, 23 Cal. 508;

*Weeks v. Goode*, 6 C. B. n. s. 367; *Roger v. Weir*, 34 N. Y. 463; Schoul. Bailm. § 123. Where merchandise of a particular kind is stored, and portions are from time to time delivered without the payment of storage dues, the warehouseman has usually a lien upon the portion left for the storage of the whole; and a like principle is often applied to goods upon which labor is expended by a tradesman; the rule as to sales being that whenever, in accordance with the intention of the parties, as legally manifested, the property in the part of the goods not delivered does not pass to a vendee, a vendor's right of lien for the whole price is reserved on the part retained. *Schmidt v. Webb*, 9 Wend. 268; *Parks v. Hall*, 2 Pick. 213; *Blake v. Nicholson*, 3 M. & S. 167. But the acceptance of a delivery-order by a warehouseman may sometimes amount to a loss of his lien, on the ground that he thereby becomes the agent of the vendee who presents it; circumstances and mercantile usage still regulating the case. *Pearson v. Dawson*, 1 Ell. B. & Ell. 448. A bailee for hire may lose his lien on a horse by allowing the possession to



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ery of the property on which the lien once fastened be merely for the lien-claimant's benefit, or by way of pledge or security to the extent of his lien, and with notice of its existence, his possession still continues and his lien as well.<sup>1</sup> Nor is the lien accruing to a partnership necessarily lost by the dissolution of the firm.<sup>2</sup>

§ 386. **Waiver, Extinguishment, or Exclusion of Lien.** — We have seen that the right of lien may be excluded at the outset by special agreement of the parties. It may likewise be waived by the subsequent agreement of the parties. Cases of this latter sort frequently arise in connection with the fact of non-possession: as, for instance, where the lien-claimant gives credit by extending the time of payment, or takes distinct and independent security for the debt; for in the one case he manifests an intention to rely upon the personal credit of the owner of the goods, and in the other to allow the security to be substituted for the lien.<sup>3</sup> In general, a special agreement made at any time, which is inconsistent with the lien, or from which its waiver may be fairly inferred, has the effect of extinguishing the lien.<sup>4</sup> And even the mere admissions of the lien-claimant are sometimes used against him; or his omission to seasonably announce a claim on that ground, while claiming the goods on some other ground, may be construed into a waiver.<sup>5</sup> But the agreement which dispenses with a lien ought, at least, to be clearly inconsistent with its continued existence.<sup>6</sup> False and fraud-

part, though the horse be still kept in his stable. *Perkins v. Boardman*, 14 Gray, 481.

<sup>1</sup> *M'Combie v. Davies*, 7 East, 5; 2 Kent. Com. 639; *Urquhart v. M'Iver*, 4 Johns. 103.

<sup>2</sup> *Busfield v. Wheeler*, 14 Allen, 139.

<sup>3</sup> *Gilman v. Brown*, 1 Mason, 191; *Cowell v. Simpson*, 16 Ves. 275; 2 Kent Com. 638; *Cowper v. Green*, 7 M. & W. 633; *Story Agency*, §§ 306, 367.

<sup>4</sup> *Ib.* And see *Weeks & Goode*, 6 C. B. N. S. 367; *Lambard v. Pike*, 33

Me. 141; 63 Me. 116; *Tucker v. Taylor*, 53 Ind. 93; *Hale v. Barrett*, 26 Ill. 195; *Story v. Flournoy*, 55 Ga. 56. The silence of a written contract respecting lien can have no such effect. 15 N. Y. Supr. 613.

<sup>5</sup> *Weeks v. Goode*, 6 C. B. N. S. 367.

<sup>6</sup> *Outcalt v. Durling*, 1 Dutch. 443; *Spaulding v. Adams*, 32 Me. 211. Neither the delivery of the goods to the creditor's agent, nor the giving of a bond by a garnishee in attachment with condition for safe-keeping and delivery, amounts to a waiver of

ulent dispossession of the lien-claimant does not defeat the latter's claim if he is prompt to repudiate.<sup>1</sup> Of course, with or without the lien as security, the debtor may be treated by his creditor as personally liable for what is owing.<sup>2</sup>

Cases might arise where a lien would revive after the party acquiring it parted possession without intending to abandon his lien; but in general, if the property be assigned *bond fide* for valuable consideration while out of the possession of the person acquiring the lien, and afterwards return into his hands, the lien does not revive as against the assignee.<sup>3</sup> Non-possession is a fact more unfavorable to the lien-claimant as against *bond fide* third parties for value acquiring rights without notice of the lien, than merely as between himself and his own debtor.<sup>4</sup> We may add that concealed liens are never to be favored.<sup>5</sup>

lien. Nor does a mere right of set-off to an amount equal to that for which the lien is claimed destroy the lien; for here the situation is that of two parties with equal demands, one of whom has his demand secured collaterally, while the other has not. *Pinnock v. Harrison*, 3 M. & W. 532; *Clark v. Fell*, 4 B. & Ad. 404.

<sup>1</sup> *Bigelow v. Heaton*, 6 Hill (N. Y.) 43. But as to the intervening rights of *bond fide* third parties for value without notice, he may sometimes be hindered in his lien by non-possession. A sale of the goods to a third person by the owner, without the knowledge of the lien-claimant, will not defeat the rights of the latter. *Bayley v. Merrill*, 10 Allen, 360.

<sup>2</sup> *Tucker v. Taylor*, 53 Ind. 93; *Garrard v. Moody*, 48 Ga. 96; 24 Ill. 99.

<sup>3</sup> *Godin v. London Assurance Co.*, 1 Burr. 489; *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268.

<sup>4</sup> See *Haak v. Linderman*, 64 Penn. St. 499.

<sup>5</sup> See *Hanna v. Phelps*, 7 Ind. 21. From what has been said, it will be readily understood why a common

carrier who has once completely and unconditionally delivered the goods loses his lien. *Boggs v. Martin*, 13 B. Monr. 243. See *Schoul. Bailm.* §§ 546, 549. And, since he is bound to deliver the goods safely, circuitry of action is now quite commonly avoided by permitting the owner to deduct, as against the charges for which the carrier's lien is given, any damage done the goods for which the carrier is liable. *Humphreys v. Reed*, 6 Whart. 435; 2 Redf. Railw. 3d ed. 156. Into the mutual rights and liabilities of parties concerned in railway transportation it is not our purpose here to enter; but the usual modes of waiving liens apply here as to carriers and bailees generally, though with much favor in the former instance. We find liens sometimes created upon railway shares for the owner's indebtedness to the company; also liens upon cars and rolling-stock, and liens of contractors and material-men; which often give rise to intricate questions in connection with the subject of railway mortgages and the rights of bondholders. See 1 Redf. Railw. 3d ed. 114, 122; 2

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§ 387. **Method of enforcing a Lien.** — The method of enforcing a common-law lien is quite imperfect; and here we find a right without its full corresponding remedy. Chancellor Kent says that a lien is, in many respects, like a distress at common law, and gives the party detaining the chattel the right to hold it by way of pledge or security for the debt, and not to sell it.<sup>1</sup> The difficulty of applying an adequate remedy is obvious, therefore, in cases where the property detained becomes a constant expense to the keeper. Thus, an innkeeper detaining his guest's horse must constantly feed the horse to keep his lien alive; while he has to await the results of a long and tedious proceeding in the nature of a bill of chancery, before he can get the lien enforced if indeed it is enforceable in equity at all.<sup>2</sup> The same principle as concerns the enforcement of a lien applies to common carriers as to other lien creditors; and they have no common-law right to sell the goods on which their transportation charges remain unpaid.

But the modern tendency of legislation is towards increasing the efficacy of remedies, so as to make them more nearly commensurate with those rights which the law means to confer, in this respect assimilating them more to a pledge security. Thus, in some States an innkeeper is allowed, by statute, to sell the property at public sale at so many days after demand. A power of selling for the satisfaction of liens, and for the cost or expenses of carriage, storage, or labor bestowed on the goods, is likewise given to commission merchants, factors, and common carriers, by our local legislation; and a summary and cheap judicial process, after demand, for the prompt satisfaction of other lien charges, is sometimes prescribed.<sup>3</sup> But few States have as yet enacted

ib. 515; *Jones Railway Securities, passim*; *United States v. New Orleans R. R.*, 12 Wall. 362.

<sup>1</sup> 2 Kent Com. 642; 1 Holt, N. P. 383; *Lovett v. Brown*, 40 N. H. 88; *Schoul. Bailm.* § 126.

<sup>2</sup> *Ib.* See *Fox v. McGregor*, 11 Barb. 41; 30 Tex. 715. The jurisdiction of equity to enforce a com-

mon-law lien has been denied; notwithstanding there is no adequate remedy at law, and even detention under the lien works inconvenience. *Jones Liens*, § 1038; *Thames Iron Works Co., Re*, 1 J. & H. 93. *Aliter*, 5 Dana, 310; 78 Ill. 116.

<sup>3</sup> See *Young v. Kimball*, 23 Penn. St. 193; *Purd. Dig.* 536; *Suppl.*

comprehensive provisions on this subject; the aim being rather to aid certain classes of lien-claimants. And again, independently of legislation, the express contract of the parties, or possibly some reasonable and well understood business usage so prevalent as to manifest an implied contract between them, might enlarge the remedies of the lien-claimant; for as reasonable and well-known custom or express contract may confer a lien, so also may reasonable custom or, better still, express contract be allowed to dictate to some extent the method of its enforcement. But wherever the remedy is thus enlarged, the courts are disposed to regard the bailor's interests sedulously, so as to require, by way of just precaution, a reasonable demand and notice to be given before a sale to satisfy the lien can be made;<sup>1</sup> and the sale, being in derogation of common law, should be fair and *bonâ fide* and upon due formality.

1844; Wms. Pers. Prop. 3d Am. ed. with Wetherell's note, 28-31; Mass. Pub. Sts. (1882) c. 96; Schoul. Ballm. § 550.

<sup>1</sup> Pothonier v. Dawson, 1 Holt, N. P. 383; Brown v. M'Grau, 14 Pet. 479; Schoul. Ballm. § 126; Whitney v. Wyman, 24 Md. 131; Marfield v. Goodhue, 3 Comst. 62; Parker v. Brancker, 22 Pick. 40; Frothingham v. Everton, 12 N. H. 239. And see 2 Kent Com. 642, Comstock's n.; Story Agency, § 74.

The American doctrine as concerns the lien of factors appears to be that the consignor of goods has no right, by any orders given after advances have been made or liabilities incurred, to suspend or control the factor's right of sale, except as to the surplus of the consignment, beyond these advances or liabilities. Brown v. M'Grau, 14 Pet. 479. Yet the rule, as recently announced in England, is that a factor has no right to sell the goods contrary to the order of his principal, though the latter has neglected on request to pay the advances. Smart v. Sandars, 5 C. B.

895. In some American cases the right to sell contrary to orders is limited to cases where, if the factor sold under his principal's orders, his own security would be impaired. Field v. Farrington, 10 Wall. 141; Weed v. Adams, 37 Conn. 378.

While the contract between the parties may frequently regulate the rights and remedies, so far as concerns advances made and liabilities incurred on account of a consignment of goods, yet we may well question whether any person has a right by common law to add to his lien upon a chattel his charge for keeping it till the debt is paid. That he has no such right was distinctly announced in a leading English case not long ago; though, as the circumstances were not in this case of the strongest kind, it is possible that the principle was understood to apply to charges in the keeping which are for the lien-claimant's peculiar benefit, and not for the benefit of the person whose chattel is in his possession. *Somes v. British Empire Shipping Co.*, 8 H. L. Cas. 338; s. c. 1 Ell. B. & L.

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§ 388. **Right of Owner of Goods to discharge Lien, etc.**— Wherever the holder by lien of property makes illegal and improper charges, and the owner pays under protest and gives notice accordingly, he may sue in an action for money had and received to recover it.<sup>1</sup> And in all cases, the owner of the property, on tendering satisfaction of the lien, has a right to the property; and if the creditor refuse to restore it after such a tender, he is answerable in damages for his misconduct; nor is even a formal tender requisite on the owner's part, if the person in possession of the goods has distinctly signified his refusal to accept the amount really due.<sup>2</sup>

§ 389. **Equitable Liens considered.**— So much, then, for the common-law lien, strictly so called. But as the word "lien" is used in a much larger sense, so we find other kinds of liens spoken of as such in the books. The *equitable lien* is something which courts of chancery constantly recognize, and the right thus borrowed from the civil law has its foundation in natural justice. By *equitable liens* we usually mean all such liens as exist in equity and of which courts of equity alone take cognizance. And a very common kind is that which exists between vendor and vendee; the rule being that every one who sells property has a lien upon it for any part of the purchase-money which is unpaid, against all persons except a purchaser without notice for valuable consideration.<sup>3</sup> Here a sort of constructive trust arises for securing the unpaid purchase-money, and to the extent of the lien the purchaser becomes a trustee for the vendor, and the burden of proof is upon the latter to establish a waiver of this lien. Even the *bonâ fide* purchaser without notice for valuable consideration

353. American statutes, as we have just seen, frequently change the rule in this respect. And where merchandise is consigned to a commission merchant who makes advances on them, the legal presumption favors his right to sell them in the exercise of a sound discretion and to reimburse himself for his advances. *Howard v. Smith*, 56 Mo. 314. See *Story Agency*, 9th ed. § 371.

<sup>1</sup> *Somes v. British Empire Shipping Co.*, 8 H. L. Cas. 338.

<sup>2</sup> *Chilton v. Carrington*, 16 C. B. 206; *Jones v. Tarleton*, 9 M. & W. 675; *Roberts v. Yarboro*, 41 Tex. 449; *Schoul. Bailm.* §§ 125, 552.

<sup>3</sup> *Story Eq. Jur.* § 1217; 4 Kent Com. 163; *Chapman v. Tanner*, 1 Vern. 267; *Bayley v. Greenleaf*, 7 Wheat. 46; *Patterson v. Edwards*, 29 Miss. 67.

has only a countervailing equity to the extent of his actual payments; and if but part of his own purchase-money has been paid, the part retained by the vendee is primarily chargeable with the lien.<sup>1</sup> But cases of this sort usually arise with reference to real estate, while we are to concern ourselves in this treatise with personal property.<sup>2</sup>

An equitable lien is sometimes acquired by the deposit of title-deeds; but liens of this sort are not in general greatly favored.<sup>3</sup> To constitute an equitable lien on a fund, there must in each case have been some distinct appropriation thereof by the debtor: it is not enough that the fund was created through the efforts and outlays of the party claiming a lien.<sup>4</sup> The lien of solicitors, attorneys, and trustees on their respective funds is recognized in equity;<sup>5</sup> and so is that of joint tenants in certain cases. And the usual way of enforcing a lien in equity is by selling the property to which the lien is attached.<sup>6</sup>

But this lien which equity recognizes is independent of the possession of property; while liens at common law require possession, as we have seen, and in fact consist rather in a right to retain possession than in anything else. And hence it is that the rights of vendor and vendee, as concerns a lien for purchase-money, are found to be so different in the two systems. For while property which courts of equity handle is made subject almost absolutely to a just lien for unpaid purchase-money, by way of judicial construction on behalf of the vendor, the common-law rule applicable to chattels is, that, so long as the vendor retains actual or constructive possession of the goods, he has a lien upon them for so much of the purchase-money as may remain unpaid, but that when he has once delivered them out of his own possession his lien

<sup>1</sup> *Ib.*; Story Eq. §§ 1217-1220, 1224, 1232, 1233; *Mackreth v. Symmons*, 15 Ves. 329.

<sup>2</sup> See vol. 2 as to the vendor's lien in sales of personal property.

<sup>3</sup> See *Goode v. Burton*, 1 Wels. H. & G. 189; 4 Kent Com. 150; Story Eq. Jur. § 1020. There may be a pledge of title-deeds. § 395.

<sup>4</sup> *Wright v. Ellison*, 1 Wall. 16; *Watson v. Duke of Wellington*, 1 Russ. & My. 602.

<sup>5</sup> See *supra*, § 383.

<sup>6</sup> See Story Eq. Jur. § 1217; *Haymes v. Cooper*, 33 Beav. 431; 2 Spence, 803.

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is gone;<sup>1</sup> a rule which we find extended, under the most pressing circumstances, only so much further as to allow of what is called the right of *stoppage in transitu* after a sale, — a right which occurs when goods are sold wholly or partly on credit, and the purchaser becomes bankrupt or insolvent before the goods arrive, and before in fact the delivery to him is perfected.<sup>2</sup> An equitable lien may be lost or waived, and one who might otherwise be entitled may forfeit his claim where guilty of laches in asserting it; for substantial justice is the basis of such rights, whether with reference to the debtor or to third parties interested in the fund.<sup>3</sup>

§ 390. **Statutory Liens; Mechanic's Lien Laws, etc.** — *Statutory liens* are now very commonly found; and under this head are to be particularly mentioned the mechanic's lien laws, now so common in every part of this country, which permit masons, mechanics, and laborers generally, to enforce their demands for work and materials furnished, by a sort of summary procedure *in rem*, against the buildings and land on which the indebtedness accrued.<sup>4</sup> Legislation has been likewise applied, as we have already intimated, not only for the purpose of extending to classes of persons excluded by operation of the common law the right of lien on goods for their demands, but for conferring upon all lien-creditors at the common law a more speedy and complete method of enforcing payment by sale outright or through judicial interven-

<sup>1</sup> See *supra*, § 386.

<sup>2</sup> *Hodgson v. Loy*, 7 T. R. 440; *Dixon v. Yates*, 5 B. & Ad. 313; 2 Kent Com. 541; Wms. Pers. Prop. 5th Eng. ed. 41. This subject of stoppage *in transitu* will be more fully examined under Sales, in vol. 2, part vi. c. 14.

<sup>3</sup> Story Eq. Jur. § 959.

To create, for the future services of a contractor, a lien upon particular funds of his employer, there must be not only the express promise of the employer to apply them in payment of such services, upon which the contractor relies, but some act

of appropriation on the part of the employer relinquishing control of the funds, and conferring upon the contractor the right to have them thus applied when the services are rendered. *Dillon v. Barnard*, 21 Wall. 430. An executory contract founded in mere intention creates no lien. *Cook v. Black*, 54 Iowa, 693.

<sup>4</sup> 2 Kent Com. 635, Comstock's n.; 3 Washb. Real Prop. 540; *Winder v. Caldwell*, 14 How. 434. And see Phillips (S. L.) on Liens, a recent American treatise especially devoted to this subject of statutory liens.

tion.<sup>1</sup> Statutes conferring a lien should express such an intention in terms not doubtful; but the statute remedy once given, the repeal of the statute while proceedings under it are pending does not, as it is held, impair the lien obligation, though it destroy the remedy.<sup>2</sup>

§ 391. **Maritime Liens considered.** — It remains for us to speak of *maritime liens*, a topic which has been in a measure anticipated by what we had to say of ships. But first it should be remarked that in many States statute provisions exist for securing the liens of persons who repair domestic ships or build ships and steamboats; a kind of lien which in some respects appears to differ from those purely maritime, being in truth statutory, though in others it certainly resembles them.<sup>3</sup> A maritime lien, like an equitable lien, does not, in common parlance, include or require corporeal or visible possession. In this connection, then, the word "lien" is used with a signification different from that of common law; and being at least as old as the civil law, like the equitable lien, a maritime lien is properly defined to be a claim or privilege upon a thing to be carried into effect by legal process; and the process universally recognized for its enforcement is by admiralty proceedings *in rem*. This claim or privilege, as it has been observed, travels with the thing into whosoever possession it may come; it is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached.<sup>4</sup>

<sup>1</sup> *Supra*, § 387.

<sup>2</sup> *Bangor v. Goding*, 35 Maine, 73; *Cincinnati v. Morgan*, 3 Wall. 275. A laborer's statutory lien is assignable. *Murphy v. Adams*, 71 Me. 113, and cases cited. Where chattels, upon which there is a registered lien, are destroyed, the lien does not attach upon new chattels substituted for them. 3 Lea, 57.

<sup>3</sup> 2 Kent Com. 635, n.; *Steamboat Waverly v. Clements*, 14 Ohio, 28; 1 Pars. Marit. Law, 106, and n. See *Sheppard v. Steele*, 43 N. Y. 52; *Hay-*

*ford v. Cunningham*, 72 Me. 128; 69 Me. 228; 18 Hun (N. Y.), 56; 44 N. J. L. 208. The present rules and decisions of the United States Supreme Court make no distinction between the liens on a domestic vessel given by the State or local law and liens under the general maritime law. 9 Ben. 309. But a draft does not bind a vessel unless given for a debt which was a lien upon her. *Woodland, The*, 104 U. S. 180.

<sup>4</sup> See *Harmer v. Bell*, 7 Moore P. C. 267; *Abb. Shipping*, 6th ed. 121, 122;



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Maritime liens are, in truth, those of which courts of admiralty take cognizance. The principal kinds of maritime liens are liens of material-men, liens for supplies, liens for advances and disbursements, liens for freight, and liens for wages ; though the word "lien" in this connection extends in judicial parlance to the salvage of goods at sea, and even to damages through collision.<sup>1</sup> The owner of the cargo has a lien, by the law of shipping, upon the ship for the safe custody of his merchandise and its due transportation and proper delivery ; but this is by virtue of the contract of affreightment, and does not exist where no definite undertaking to transport can be shown.<sup>2</sup> As courts of equity constitute the appropriate tribunal for enforcing all equitable liens, so do courts of admiralty take cognizance usually of all maritime liens.

§ 391 *a*. **The Same Subject.** — Of maritime liens, that for seamen's wages seems to be especially favored ; and they are often preferred to those of material-men and others whose claims rest upon the necessities of the vessel.<sup>3</sup> As to material-men, the common-law rule is, that they acquire no particular lien upon the ship by repairing it in a domestic port ; for which cause legislation, as we have lately noticed, has been called in to aid in securing and enforcing demands so reasonable.<sup>4</sup> Yet in a foreign port it is otherwise ; and sound policy enforces the doctrine — beneficial both to the material-man who desires security from an utter stranger, and to the ship-master who must have credit in order to save from ruin the valuable interests committed to his keeping — that where repairs have been made, or necessities furnished to a foreign ship, or to a ship in a port of a State to which it does not belong, the party doing so has a lien on the ship for his security, which may be enforced in the admiralty by proceedings *in*

The *Brig Nestor*, 1 Sumner, 73 ; Wall. 517 ; The *Maggie Hammond*, 9 Bright. Fed. Dig. 550, 795 ; The *Kimball*, 3 Wall. 37.

<sup>1</sup> *Harmer v. Bell*, *supra* ; Bright. Fed. Dig. 797 ; Abb. Shipping, 5th Am. ed. 143, and Perkins's *n.* ; 1 Ld. Raym. 393 ; *supra*, §§ 315, 330.

<sup>2</sup> *Schooner Freeman v. Buckingham*, 18 How. 188 ; The *Keokuk*, 9

<sup>3</sup> See Bright. Fed. Dig. 797, 801. And see *supra*, §§ 212, 307, 313, 315, 317 ; Jones Liens, §§ 1693-1699.

<sup>4</sup> See section preceding ; The *General Smith*, 4 Wheat. 438 ; The *Grape-shot*, 9 Wall. 129 ; The *Two Ellens*, L. R. 3 Ad. & Ecc. 345.

*rem.*<sup>1</sup> Hence the question always arises whether the ship is at its own or another port, in its own State or a foreign State. And the same rule of general maritime law applies to repairs and supplies ; though it is manifest that while repairs could hardly fail to be necessary, — and it is to such repairs only that the rule is meant to apply, — supplies might be quite unnecessary in the quality or amount furnished. And so in some of the earlier admiralty cases in this country it was ruled that, in order to create a maritime lien for supplies furnished, there must be a necessity for the supplies and an impossibility to obtain them except on the vessel's credit ; but the latest decisions favor the lien-creditor more liberally, by setting up a presumption sufficient to support a lien wherever the vessel is in apparent need of repairs or supplies in the foreign port.<sup>2</sup>

The master's lien for advances and disbursements has not been favored as a common-law right, and in England the doctrine has been denied altogether.<sup>3</sup> Of the other kinds of maritime lien, that for freight earned by the ship gives rise to constant controversy, and the leading principles applicable to that topic we have already noticed at some length.<sup>4</sup> It appears to be well settled that by the general maritime law there is a lien on the cargo for freight, whether shipped under a bill of lading or a charter-party, or by parol ; for the rights and responsibilities of the ship-owners as concerns their transportation business are very much like those of common carriers by land.<sup>5</sup>

<sup>1</sup> *Ib.* ; Bright. Fed. Dig. 798 ; *The Lulu*, 10 Wall. 192. Supplies furnished to a ship in a foreign port, and necessary to be used for the voyage, and actually so used, constitute a lien in the absence of evidence to the contrary intent. *The Patapsco*, 13 Wall. 329. Liens for advances of funds for the necessities of vessels in a foreign port take priority, moreover, over existing mortgages to creditors at home. *The Souder*, 17 Wall. 666.

<sup>2</sup> *Cf. The Grapeshot and The Lulu*,

*supra*, and *Pratt v. Reed*, 19 How. 359.

<sup>3</sup> See *Hamilton v. Baker*, 14 App. Cas. 209 ; reversing various decisions in the lower courts as to act 1861 (24 Vict. c. 10). Ordinarily no lien exists in favor of the master for his disbursements in the service of the ship ; though there may properly be one recognized in some instances by way of subrogation to the liens of others. 15 Fed. Rep. 558.

<sup>4</sup> See *supra*, §§ 319-321.

<sup>5</sup> *The Volunteer*, 1 Sumner, 551 ;

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§ 392. **The Same Subject.** — A maritime lien may of course be lost or waived ; and like an equitable lien it will not be upheld, especially as against *bond fide* third parties in interest, where the party claiming it is guilty of laches in enforcing his demand. The ship-owner who claims freight on goods loses his lien therefor, if he delivers, voluntarily and unconditionally, possession of the goods to the consignee, notwithstanding maritime liens do not depend generally upon possession ; and here again he resembles a common carrier by land.<sup>1</sup> A reasonable time to enforce a lien by suit is always allowed ; which appears to be the limitation against *bond fide* third parties in interest ; and neither giving credit for a fixed period, nor allowing a ship to sail without payment, nor commencing a suit *in personam* instead of resorting at once to admiralty process *in rem*, nor even accepting notes for the sum due, necessarily amounts to a waiver of the lien.<sup>2</sup> And yet one or more of these circumstances might go towards defeating a lien already acquired ; as, for instance, where the rights of a third person had intervened through the laches of the lien-creditor ; or notes were accepted, not with an understanding that the lien should continue, but as in full satisfaction of the creditor's demand.<sup>3</sup> The waiver of a lien is not readily inferred, however, from any contract which fails in being explicit to that effect ; and courts of admiralty are, on the whole, reluctant to deprive the lien-creditor of his security, when once fairly obtained, especially as between himself and the debtor alone.

§ 393. **Broad Significance of "Lien" in Judicial Language.** — As a final illustration of the broad significance which the

The Eddy, 5 Wall. 481. See McLean v. Fleming, L. R. 2 H. L. Sc. 128. Drafts purporting to be "recoverable against the vessel," &c., on their face, do not bind the vessel unless the debt itself was a lien upon her. The Woodland, 104 U. S. 180.

<sup>1</sup> The Kimball, 3 Wall. 37 ; *supra*, § 386.

<sup>2</sup> Mehan v. Thompson, 71 Me. 492 ; Jones Liens, § 1808.

<sup>3</sup> See Bright. Fed. Dig. 796-799 ; Peyroux v. Howard, 7 Pet. 324 ; The Paul Boggs, 1 Spr. 369 ; The St. Lawrence, 1 Bl. 523 ; 3 Kent Com. 171 ; Abb. Shipping, 143, 662, and Perkins's n. Liens not enforced before the ship departs upon a new voyage are generally postponed to liens of the later voyage. 30 Fed. 789 ; 42 Fed. 299. And see Jones Liens, §§ 1799-1812.

word "lien" has acquired, we may add that courts often speak of the lien of an attachment; and that judgments are likewise regarded in the light of a lien upon the judgment debtor's real estate.<sup>1</sup> Moreover a pledgee's security is often somewhat loosely stated as a lien in our modern reports. While, therefore, to conclude, we commonly understand that a creditor whose debt is secured by a lien on personal property holds the chattel as security for his debt, with the right of retaining possession until the debt is paid, we also find that, in a larger sense, wherever property either real or personal is charged with the payment of some debt, claim, or demand, every such charge, however it may be enforced in the courts, is termed a lien upon the property, as being in the nature of a privileged claim.

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## CHAPTER V.

### DEBTS SECURED BY PLEDGE; COLLATERAL SECURITY.

§ 394. **What is a Pledge or Pawn; Collateral Security.** — The topic of pledge or pawn is usually considered under the general head of bailments, by common-law writers, though it is usually connected with debts or loans and like bailment title itself constitutes part of the law of personal property. From

<sup>1</sup> Williams v. Benedict, 8 How. 107; Metcalf's Yelv. 67 i; 4 Kent Com. 173; *Ex parte* Foster, 2 Story, 131.

The writer is not aware of any modern text-book of practical usefulness to professional men, which treats of liens as they exist at the English and American law, so far as relates to personal property. This subject may be studied, however, in Schouler Bailments, §§ 122-127, 326, 542-550, with especial reference to hired workmen upon a chattel, innkeepers, and common carriers. And as to the lien of common carriers see also

Angell and other writers on that special subject. For the lien of factors, attorneys, and agents, generally, the latest edition of Story Agency, §§ 351-390, may be read. Story and other writers on Equity Jurisprudence consider the equitable lien; while works on Shipping (see c. 1, *supra*, note at end) treat of maritime liens.

Mr. Leonard A. Jones (1888) has published a comprehensive work of two volumes on the subject of liens, in which this whole subject may be studied in detail; and the above paragraph stands modified.

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debts secured by lien we advance a step when we come to those which have the more ample common-law security furnished by a pledge of chattels. A debt frequently arises in these days from the loan of money; and when the loan is accompanied, as we frequently find it, by a pledge of some other kind of incorporeal personal property, for the purpose of assuring more completely the performance of the principal engagement, it is usually in these days called among business men, though not with logical exactness, a loan on *collateral security*. Thus, a man borrows one thousand dollars, for which he gives his promissory note, and also deposits with the lender, by way of collateral security, certificates of stock, or the promissory note of a third person; and in consequence, for repayment of this loan with interest, the capitalist avails himself not only of the borrower's credit, but of the property deposited with him in addition.<sup>1</sup>

A *pledge* or *pawn*, then, consists in the bailment of personal property as security for some debt or engagement; and by bailment we denote a delivery upon the understanding (or at least a rightful possession under the obligation) that the property shall be held according to the special purpose of

<sup>1</sup> The law of pledge, together with the history and modern growth of such transactions, may be found treated at length in the writer's volume on Bailments. Only a brief summary of that law can be attempted within the limits of the present chapter. See Schoul. Bailm. part iv. c. 4. "Collateral security" or "collateral" alone are mercantile expressions which have no precise legal significance. As a chancery phrase, "collateral security" long ago, in other connections, came to signify a security given in addition to the principal security. Where one borrows money on mortgage and deposits bonds, there may arise a strict loan on collateral security. But the colloquial use of these words is not so precise. See 16 Ch. D. 211, 217; 11 Penn. St. 120. Giving one's

simple promissory note for the loan, and bonds, stock, &c., as security, might to many seem a proper instance under the same head; and hence, perhaps, the true origin of this mercantile use of such words. But there is practically no such rigid construction applied, even from the bench; and *semble*, unless the note given for the loan were indorsed, it could not fairly of itself be called "a principal security." As an expression not confined to strict pledge, by way of contrast with chattel mortgage, &c., "collateral security" seems sometimes to be preferred in the courts for its very vagueness. Mr. Jones thinks the term a convenient one to designate a pledge of incorporeal personal property. Jones Pledge, § 1.

the delivery or taking, and restored or delivered over when that purpose is fully accomplished.<sup>1</sup> This pawn or pledge corresponds to the *pignus* of the civil law where the thing was delivered to the creditor ; while if its possession remained with the debtor, although the property was pledged as security, the civil law called it *hypotheca* ; though some considered that the difference between *pignus* and *hypotheca* was one of sound only.<sup>2</sup> Like our pledge, the *pignus* seems to have been confined to personal property.<sup>3</sup> In our language the terms "pawn" and "pledge" seem to be interchangeable, and are used indifferently by law-writers ; yet out of regard to the well-known business of pawnbrokers, which never was thought to be of an elevated character, we often find that the word "pawn" is confined in parlance to those petty transactions concerning things corporeal which characterize this particular business ; while persons who deal in those moneyed or incorporeal securities which a mercantile community favors, generally apply the comprehensive term "pledge" in preference, or else characterize the loan as one upon collateral security. For pledge transactions are found altogether too convenient in the modern business world to be confined to mean lenders and small borrowers ; and pledge rather than pawn is the favored generic term of the transaction.

§ 395. **What Things may be the Subject of Pledge.** — What things may be the subject of pledge ? As we have already intimated, the transaction is confined to personal property ; and of personal property, all kinds which are visible and tangible may be pledged, and, besides, as modern cases fully establish, the various incorporeal species, so far at least as concerns those which are evinced by instruments in writing, which writing may itself be delivered. In old times the business of loaning on pledge or pawn was chiefly in the hands of the Jewish pawnbrokers ; and in the leading case

<sup>1</sup> Story Bailm. §§ 7, 286 ; 2 Kent Com. 577 ; Bouv. Dict. "Bailment," "Pledge ;" 2 Bl. Com. 452 ; Schoul. Bailm. §§ 13, 162.

<sup>2</sup> 2 Kent Com. 577. See Dig. lib. 20, tit. 1, cited in Story Bailm. § 286 ; Pothier de Nant. art. Prelim. n. 2 ; Schoul. Bailm. § 166.

<sup>3</sup> *Ib.*

of *Coggs v. Bernard* we find Lord Holt laying down the law with particular reference to jewels, wearing apparel, and domestic animals.<sup>1</sup> But in these days no such narrow application of principles would be deemed suitable; and bills and notes, government and municipal securities of various kinds, coupon bonds, shares of stock, title-deeds, savings-bank books, judgments, chattel or real estate mortgages, insurance policies, leases, and patent rights, are constantly interchanged in our business community for the purpose of pledge.<sup>2</sup> It is the giving in pledge of incorporeal property of various kinds with their various incidents, by some voucher or muniment of title, that so greatly obscures the law of the present day. Chattels incapable of delivery cannot, logically speaking, be the subject-matter of pledge; but since *choses in action* or money rights may at least be assigned, delivery of the muniment or voucher obviates all practical difficulty.<sup>3</sup>

Chattels of any kind, which are available in the holder's hands, may in this manner be delivered as security for a debt; provided they be in existence at the time of the pledge transaction.<sup>4</sup> But a technical objection arises where the attempt is made to make property not in existence the subject of a pledge; since the present pledge of property to be

<sup>1</sup> 2 Ld. Raym. 917.

<sup>2</sup> See *Morris Canal Co. v. Lewis*, 1 Beas. 667; *Donald v. Suckling*, L. R. 1 Q. B. 585; *Wilson v. Little*, 2 Comst. 443; *Story Bailm.* 9th ed. § 290; 2 Kent Com. 577, 578, and *n.*; *Houser v. Kemp*, 3 Penn. St. 208; *Swift v. Tyson*, 16 Pet. 1; *Talty v. Freedman's Savings Co.*, 93 U. S. 321. For late decisions as to these various kinds of personal property, see *Schoul. Bailm.* §§ 172, 173. Not only are leases thus reckoned by a deposit of deeds, but a mortgage of real estate likewise, which before foreclosure is personal property. *Jerome v. McCarter*, 94 U. S. 734; 9 Bosw. 322; 8 Cal. 145; *English v. McElroy*, 62 Ga. 413. A pledge may be made of rails laid down by agree-

ment for a temporary purpose upon another's land, as well as of the railway rolling stock, since they are all personal property. *Woodward v. Exposition R.*, 39 La. Ann. 560; § 131.

<sup>3</sup> *Talty v. Freedman's Savings Co.*, 93 U. S. 321; *Schoul. Bailm.* § 173; *supra*, §§ 72-76, as to assignment. Under mercantile usage of the present day, the pledge of a bill of lading of goods in transit by land or water effects a pledge of the goods. *Schoul. Bailm.* § 173; *Hathaway v. Haynes*, 124 Mass. 311; *Marine Bank v. Fiske*, 71 N. Y. 353. The pledge of goods in a warehouse may be similarly affected under a warehouse receipt. *Schoul. Bailm.* § 173.

<sup>4</sup> See *Schoul. Bailm.* §§ 174, 175.

hereafter acquired gives no immediate delivery of possession to the pledgee, and is rather an hypothecation than a strict pledge. Modern decisions on this point appear to leave the subject in some uncertainty. But just as equity sustains the sale and transfer by assignment of expectant and reversionary interests, so is the judicial disposition strong in many States to sustain a pledge transaction where not a mere possibility but a potential actual interest is given in security.<sup>1</sup> And thus has a pledgor's interest been gained not only in the principal thing pledged, but in certain accessions thereto besides. If a pledge contract undertakes to put in security that which, as a subject-matter, is not actually in existence, there can be no immediate bailment to the pledgee, technically speaking, for there is nothing to deliver; and non-existence excludes attachment by the pledgor's creditors none the less. But we may perhaps correctly assume that the pledge contract of after-acquired chattels or chattels by accession, so far as courts sustain the arrangement, gives the pledgee a right strong as to the pledgor himself, because of their mutual agreement, but which as against third parties he must perfect when opportunity offers, and so that actual or constructive delivery and acceptance shall follow the accession or production of the new thing, before adverse rights can *bonâ fide* attach thereto.<sup>2</sup>

It is laid down justly as a doctrine borrowed from the Roman law, that, by the pledge of a thing, not only the thing itself passes, but the natural increase thereof as accessory; thus, if a flock of sheep are pledged, the young afterwards born during the continuance of the bailment become pledged also.<sup>3</sup> In like manner dividends or interest pay-

<sup>1</sup> Schoul. Bailm. §§ 174, 175; *Bel-lows v. Wells*, 36 Vt. 599; *Goodenow v. Dunn*, 21 Me. 86; 10 Met. 481; 30 La. Ann. 943.

<sup>2</sup> See, as to a brickmaker's agreement with lessees of a brick yard, *Macomber v. Parker*, 14 Pick. 497. Also *Smithurst v. Edmunds*, 14 N. J. Eq. 408, the case of added furniture to be security for a landlord's rent;

*Ayers v. Banking Co.*, L. R. 3 P. C. 548. And see Schoul. Bailm. §§ 174, 175. But as to a crop growing, see Schoul. Bailm. § 175; 86 Ill. 591; 7 Wis. 159. Here the rule is strict against a pledgee, unless he gets possession before other rights can intervene.

<sup>3</sup> 1 Domat. b. 3, tit. 1, § 1, arts. 7-10; Story Conf. Laws, § 292; La.



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ments, the natural and obvious increment of stock or interest-bearing securities, become pledged, as soon as due, by inference from the pledge contract.<sup>1</sup> A number of things personal of various kinds, may of course be given in pledge security together for the same debt or engagement.

§ 396. **The Same Subject.**— But there are some things which are generally forbidden to be the subjects of pledge; as, for instance, the pensions, bounties, and pay of soldiers and sailors, and their widows, which are protected by the public against the possible improvidence of this class of persons.<sup>2</sup> And yet, as to necessities, these can be pledged or pawned at the common law; and it is no uncommon thing for a person in distress to take garments to the pawnbroker which ought to be on his own back; a good reason for the rule being, perhaps, that as to any particular chattel it is almost impossible to say whether it is or is not a necessary, in connection with the mere act of pledge, since questions of this sort have reference to the general circumstances and situation of the pledgor.<sup>3</sup> Nor does a statute exemption of certain articles from attachment or execution sale forbid their being pledged so as to bind the pledgor.<sup>4</sup> Our national banks cannot loan or discount on the security of their own stock, unless necessary to prevent loss on a debt previously contracted in good faith.<sup>5</sup> And local statutes frequently interpose special checks upon the right or the method of pledging property, so far as interested third persons without notice in particular are concerned.<sup>6</sup>

§ 397. **The Debt or Engagement to be secured.**— As to the

Code (1825), art. 3135; Schoul. Bailm. § 176; Story Bailm. § 292. Some local American statutes are explicit on this point, following the civil law.

<sup>1</sup> Schoul. Bailm. § 176; 1 Hughes, 17.

<sup>2</sup> See Story Bailm. § 293.

<sup>3</sup> Story Bailm. *ib.*; M'Carthy v. Gould, 1 Ball & B. 389; 3 T. R. 681; Schoul. Bailm. § 177.

<sup>4</sup> Frost v. Shaw, 3 Ohio St. 470.

<sup>5</sup> Bank v. Lanier, 11 Wall. 369.

<sup>6</sup> Thus, by the law of Louisiana,

registration of the transaction of pledge is required as against third parties who may become creditors. And in some States the pledge of stock must be accompanied, according to statute, with a description of the debt in the instrument of transfer; the certificate issued to the pledgee expressing on its face that he holds as collateral security. See Mass. Pub. Stats. (1882), c. 105, § 25; since modified (1884).

debt or engagement secured, this may be primary or secondary on the pledgor's part, absolute or conditional, for the payment of money or for any other lawful performance of an engagement. The pledgor may be bound to the debt or engagement as indorser or surety for another, or as himself the maker or principal. So, too, may the security be taken by the pledgee for the repayment of money loaned (which is the usual case) or so as to indemnify him for becoming an indorser or surety at the pledgor's instance.<sup>1</sup> In every instance some lawful debt or engagement which is or may be owing the pledgee constitutes the foundation of the security upon which the thing is given. The object may be to secure a general or a specific indebtedness, part or all of what is owing; to protect what is already outstanding from the pledgor, or so as to include future liabilities as they may arise in favor of the same pledgee; to cover obligations for a fixed or for an indefinite period; provided always that the transaction be genuine as to such intent, and not, as against third parties, a device for defrauding them; also that it be confined to the specific debt or engagement mutually agreed upon.<sup>2</sup>

§ 398. **Who may pledge or receive in Pledge.**—Mutual assent is needful to a pledge contract; and in such transactions the usual rules of contract apply. The contract should be entered into by parties legally competent thereto; neither disqualified, as are insane persons, nor, like certain kinds of corporations, placed under statute disabilities.<sup>3</sup> Force and

<sup>1</sup> Story Bailm. § 300; Wilcox v. Fairhaven Bank, 7 Allen, 270; Brick v. Freehold Co., 37 N. J. L. 307; Gilson v. Martin, 49 Vt. 474; 34 Mich. 4; Third Nat. Bank v. Boyd, 44 Md. 47; Schoul. Bailm. § 178.

<sup>2</sup> Schoul. Bailm. § 178; Story Bailm. § 300; Stearns v. Marsh, 4 Denio, 227; United States v. Hooe, 3 Cr. 73; Berry v. Gibbons, L. R. 8 Ch. 747. Personal property specifically pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance. Duncan v. Bren-

nan, 83 N. Y. 487; Fridley v. Bowen, 103 Ill. 633. "All indebtedness existing or which may hereafter exist" may be secured by one pledge. Moors v. Washburn, 147 Mass. 344. As to a pre-existing indebtedness the rule is not uniform. See 108 Ind. 183; 111 Penn. St. 291.

<sup>3</sup> Schoul. Bailm. § 179; Bank v. Lanier, 13 Wall. 369; L. R. 10 Eq. 381. A statute prohibition may yet leave rights of pledge or receiving in pledge *sub modo*. Curtis v. Leavitt, 15 N. Y. 9.

fraud render such contracts voidable. Illegality, as, for instance, in securing a debt incurred for victuals used in a debauch, renders the contract null ; though here, if the contract be executed by delivery of the pledge, the pledgor may often be the worse off in proving unable, because of his own wrong, to assert his right as owner against the pledgee.<sup>1</sup>

It is not essential to the validity of the pledge contract that the thing pledged should belong to the pledgor himself. As between the parties themselves and as against the general public, that transaction may be upheld which some person with a better title might successfully impugn.<sup>2</sup> Nor can any pledgor assert his own wrongful delivery of another's property as a ground for recovering it from the pledgee without first discharging the pledge obligation.<sup>3</sup> Agency, express or implied, confers authority ; in any case it is sufficient that the owner consented to have the thing pledged ; and a transaction might amount constructively to a pledge, so that even the true owner could not reclaim the property without discharging the obligation.<sup>4</sup> One who has a limited title to a thing, or a special interest in it, — as, for instance, a life-owner or a lien-creditor under some bailment, — is allowed to pledge to the extent of his title, though not in strictness beyond it.<sup>5</sup> And it is held that the pledge of collaterals by one who holds them from another party is not *per se* a conversion as against that party ; for if he is prepared to restore them at the proper time, the original pledgor has no cause for complaint.<sup>6</sup> In general, however, to create a pledge, the pledgee should have possession and actual control of the property.<sup>7</sup> And aside from the peculiar incidents which

<sup>1</sup> Taylor v. Chester, L. R. 9 Q. B. 309 ; Causey v. Yeates, 8 Humph. 605 ; King v. Green, 6 Allen, 139 ; Schoul. Bailm. § 180.

<sup>2</sup> Jarvis v. Rogers, 13 Mass. 105 ; Story Bailm. § 291 ; Schoul. Bailm. § 180.

<sup>3</sup> Story Bailm. § 291 ; Goldstein v. Hort, 30 Cal. 372 ; Schoul. Bailm. § 180.

<sup>4</sup> Story Bailm. § 291 ; Jarvis v.

Rogers, 13 Mass. 105 ; Schoul. Bailm. §§ 180-182.

<sup>5</sup> Story Bailm. § 295 ; Hoare v. Parker, 2 T. R. 376.

<sup>6</sup> Shelton v. French, 33 Conn. 489 ; Schoul. Bailm. § 182.

<sup>7</sup> Corbett v. Underwood, 83 Ill. 324. As to the right of a true owner to receive property pledged without his assent, see § 406, *post*.

Concerning the right of factors

belong to negotiable instruments, the owner of stolen or misappropriated chattels wrongfully pledged may recover them from even a *bonâ fide* pledgee without refunding what the latter may have loaned the wrong-doer.<sup>1</sup>

§ 399. **Delivery in Pledge; Retention of Possession.**—That the pledged property should be delivered to the pledgee is for obvious reasons a cardinal doctrine in the law of pledge; and by delivery of possession we mean such delivery as the thing is capable of. The method of transferring stock and other species of incorporeal chattels is frequently regulated by statute; and our policy in this country is in some states to discountenance secret transfers by way of collateral security, where the effect is to mislead creditors and other third parties in interest, and put their interests at jeopardy.<sup>2</sup> Furthermore, it is essential to the contract of pledge that this delivery should be as security for some debt or engagement. Until an actual transfer of possession has taken place, either of a visible and tangible thing, or of a visible and tangible voucher of title of some incorporeal right, there is, to speak

and agents in certain cases to pledge the goods of their principals, there are numerous decisions which we need not particularly examine. The strict common-law doctrine is, that a factor may sell, but that he cannot pledge, the goods of his principal as security for his own debt, whether by indorsing and delivering the bill of lading or by delivery of the goods. See *Story Agency*, § 113, and *n.*; 2 *Kent Com.* 625-628 and *n.*; *M'Combie v. Davies*, 7 *East*, 5. But the modern tendency is towards placing factors upon the usual footing of agents in this respect. The English *Factors' Act* mitigates the rigor of the common-law rule, in providing that a pledge of goods by a factor, for any original loan or advance, or any continuing advance, made on the security of the goods, shall be valid; and the tendency of legislation in this country is towards enlarging the rights of the *bonâ fide* pledgee of any

person who has possession of merchandise or a bill of lading with power to sell. See *Jones Pledge*, §§ 327-353; *Fuentis v. Montis*, L. R. 4 C. P. 93; L. R. 4 Eq. 315; *Newbold v. Wright*, 4 *Rawle*, 195; *Schoul. Bailm.* §§ 181-186; *Carter v. Wilmerding*, 24 N. Y. 521; 81 *Penn. St.* 76. Ordinarily, in modern times, there is no substantial difference in effect between a pledge by a factor who has a claim for advances and by a pledgee. *First Nat. Bank v. Boyce*, 78 *Ky.* 42. As to holding property or recouping the pledged debt against the owner in certain cases, see § 406, *post*.

<sup>1</sup> *Singer Man. Co. v. Clark*, 5 *Ex. D.* 37; *Schoul. Bailm.* § 181.

<sup>2</sup> See *infra*, as to Stocks; *Wilson v. Little*, 2 *Comst.* 443; *Ex parte Boulton*, 1 *De G. & J.* 163; *City Fire Ins. Co. v. Olmsted*, 33 *Conn.* 476; *Nevan v. Roup*, 8 *Clarke (Iowa)*, 207.

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with precision, no pledge, no bailment; but rather an executory pledge contract upon sufficient consideration which each of the pledge parties may hold the other bound to perform.<sup>1</sup> For under a pledge contract, as we must bear in mind, there is no transfer of an owner's title, as in the case of sale or mortgage; nor is there a registry of some writing; but the essence of the pledgee's preference to others acquiring *bond fide* rights *in rem* consists in an apparent transfer of possession from the owner.<sup>2</sup>

An essential to a complete delivery of the thing pledged is that the pledgor should deliver that or do that with reasonable expedition which enables the pledgee to take and effectually control the property. Thus, the transfer and delivery of a warehouse key or of warehouse receipts may suffice as a constructive delivery of the thing deposited there. In modern times advances are constantly made by way of pledge upon the transfer of bills of lading of goods in transit by land or water, and such constructive delivery is considered good.<sup>3</sup> But without such a delivery as may satisfy the requirements of the law, and particularly as regards rights *bond fide* acquired by others without notice of a pledge, the firmly established doctrine is that the bailment of the thing does not fully take place, and the pledge rests in little or nothing more than an executory contract.<sup>4</sup> And delivery, to be effective, should be followed by an acceptance of possession.<sup>5</sup> Wherever property is pledged as security for a debt, it is immaterial whether the pledgee holds the property or some third person holds it for him.<sup>6</sup> Of course, if the pledgee is already in possession of the thing, there need be no formal delivery to him in security.<sup>7</sup>

While a symbolical delivery and acceptance in pledge is

<sup>1</sup> Schoul. Bailm. §§ 188, 189; Story Bailm. § 297; City Fire Ins. Co. v. Olmsted, 33 Conn. 476.

<sup>2</sup> Schoul. Bailm. § 189.

<sup>3</sup> Schoul. Bailm. § 190; Dows v. Nat. Exchange Bank, 91 U. S. 618; First Nat. Bank v. Kelly, 57 N. Y. 34; Pettit v. First Nat. Bank, 4 Bush, 334.

<sup>4</sup> 2 Kent Com. 580 and n.; Story Bailm. § 297; Whitney v. Tibbits, 17 Wis. 359; Cartwright v. Wilmerding, 24 N. Y. 521; Atkinson v. Maling, 2 T. R. 462.

<sup>5</sup> Schoul. Bailm. § 189.

<sup>6</sup> Brown v. Warren, 43 N. H. 430.

<sup>7</sup> Schoul. Bailm. § 191.

strongly favored by modern authorities, and especially so with reference to the pledge parties themselves, the pledgee ought to follow any such constructive delivery by acts evincing the intention of pursuing his opportunities to make the corporeal transfer complete; for a symbolized transfer stands for something which may be made conclusive.<sup>1</sup> And as to bills of lading, he should consider that, notwithstanding the modern tendency of courts and legislatures to treat them substantially as negotiable in many respects, they are not necessarily negotiable in any such sense as to make his rights secure merely because he has become a *bond fide* holder of the instrument on good consideration.<sup>2</sup> The element of seasonable notice to the warehouseman, or, in case of various incorporeal instruments to the fundholder or fundamental debtor, is an important one to make the pledgee's security complete.<sup>3</sup>

§ 400. **The Same Subject.**—Now, supposing the delivery of the pledge is once completed, and possession has vested in the pledgee, what will be the effect of his delivering the thing back and parting with its possession? It is important, in such event, to gather from the circumstances what was the pledgee's intention in so doing. If he redelivers the pledge to the pledgor for a temporary purpose only, and upon the understanding that it shall be returned, or in order that something may be substituted for it; or if the pledgor wrongfully, whether by force or stratagem, gets possession again without the pledgee's acquiescence,—wherever, indeed, as a fact, the pledgee has not redelivered the pledge of his own knowledge and consent fully and completely; the pledgee may in such case demand and recover the pledge again.<sup>4</sup> This principle is illustrated in a case where the pledgee of a promissory note returned it under an agreement that the

<sup>1</sup> Schoul. Bailm. § 190; Barber v. Meyerstein, L. R. 4 H. L. 317. Where bills of lading are issued in duplicate or triplicate, the danger of a pledgee who does not promptly present his bill to the carrier is greater. Glyn v. East India Dock Co., 7 App. Cas. 59.

<sup>2</sup> 101 U. S. 557; c. 8, *post*.

<sup>3</sup> Schoul. Bailm. § 194.

<sup>4</sup> Walcott v. Keith, 2 Fost. 196; Robert v. Wyatt, 2 Taunt. 268; Way v. Davidson, 12 Gray, 465; Schoul. Bailm. § 193. The pledgor who gets back the thing with felonious intent may be indicted for larceny. Bruley v. Rose, 57 Iowa, 651.

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pledgor should return it or another note.<sup>1</sup> Nor is property beyond the pledgee's reach, if he gave it back to the owner in some new character, as a special bailee or agent, for example.<sup>2</sup> But whether, under circumstances like these, the pledgee can follow the property into the hands of a *bonâ fide* holder for value, without notice of the transaction, to whom the pledgor had meantime transferred it, is quite another matter; and upon this point the authorities are somewhat at conflict.<sup>3</sup> However this may be, the pledgee certainly loses the benefit of his security, whenever by a complete out-and-out delivery back to the pledgor he voluntarily places the property beyond his own reach;<sup>4</sup> and by wantonly or negligently abandoning possession to any third person and failing to assert his pledge rights against others, when it was proper to do so, he may likewise be debarred of the advantage of a pledgee.<sup>5</sup> The

<sup>1</sup> Way v. Davidson, 12 Gray, 465. And see Hays v. Riddle, 1 Sandf. 248.

<sup>2</sup> Macomber v. Parker, 14 Pick. 497; Thayer v. Dwight, 104 Mass. 254; 7 Cow. 670; Schoul. Bailm. § 193.

<sup>3</sup> See Story Bailm. § 299; Reeves v. Capper, 5 Bing. N. C. 136; Bodenhammer v. Newsom, 5 Jones, 107; Schoul. Bailm. §§ 193-199.

<sup>4</sup> Whitaker v. Sumner, 20 Pick. 399; 1 Atk. 165; Day v. Swift, 48 Me. 368; Black v. Bogert, 65 N. Y. 601; Schoul. Bailm. §§ 201-203; Casey v. Caveroc, 96 U. S. 467.

Two leading conclusions may be drawn from the modern precedents as to pledge delivery and retention of possession. (1.) That in the growing complexity of commercial and mercantile transactions, with so many new classes of incorporeal rights coming into the list of things personal, the disposition increases to apply to all chattel transfer the test of mutual intent; so that the English and American courts, while abating little of the theory that a change of possession must attend every pledge transaction, have come to swerve very far from it in practice. (2.) That,

with the present laxity of construction, pledge delivery seems to comport itself differently under three leading aspects: (a) as between the pledge parties themselves; (b) as between the pledge parties and the public or the pledgor's general creditors; (c) and as between pledge parties and those, like a pledgor's attaching creditors or purchasers, who acquire intervening rights *in rem* without notice. In this connection, the element of notice to the debtor or fundholder is further of consequence. In general, we may add, the position of a pledgee is far less favorable for maintaining his cause where he is out of full personal control and must take the offensive, than where he has such control and has only to defend. Schoul. Bailm. §§ 201, 202.

<sup>5</sup> Schoul. Bailm. §§ 201-203; Whitaker v. Sumner, 20 Pick. 399; Treadwell v. Davis, 34 Cal. 601; 5 Humph. 308. Cf. Arendale v. Morgan, 5 Sneed, 703.

Pledge of savings-bank book by delivery with suitable intention may be sufficient as amounting to an equitable assignment. Taft v. Bowker, 132 Mass. 277. The modern

fact of a redelivery or repossession of the pledge is not therefore conclusive, but remains open to explanation.<sup>1</sup>

laxity of this rule of assignment, as compared with the old common law concerning incorporeal personalty, has elsewhere been noticed at length. *Supra*, §§ 72-80. The various kinds of incorporeal personalty are treated somewhat differently in different States. Thus, stock, in order to be fully protected as collateral security, must, under some statutes, be transferred on the books, and suitable certificates issued. But in some other States a certificate of stock with blank indorsements, &c., affords substantially full *indicia* of pledge title. See *Cherry v. Frost*, 7 Lea, 1; 31 La. Ann. 149. Bills of lading give rise to many decisions. See chapter 8, *post*. But it by no means follows that, because the instrument is in a sense negotiable, all the favorable consequences of possession as against third parties must ensue. *Shaw v. Merchants' Bank*, 101 U. S. 557. And see, as to the effect of incomplete delivery or failure of possession, *Dunn v. Meserve*, 58 N. H. 429. Cf. *Holmes v. Bailey*, 92 Penn. St. 57. Seasonable notice to the fundholder or debtor is an important element in completing a delivery and retention of possession as against third parties. *People's Bank v. Gayley*, 92 Penn. St. 518. And such is the rule in assignments generally. *Supra*, §§ 78, 79. So applied in England recently, where a *bonâ fide* delivery was made under one bill of lading, where the old custom (not to be commended for modern dealings) prevailed of making out such bills in triplicate, and the pledgee who took one of the three in security failed to notify the carrier of his rights. *Glyn v. East India Dock Co.*, 7 App. Cas. 591; s. c. 6 Q. B. D. 475.

Delivery is especially essential to the validity of a parol pledge. 18 Hun, 187. And in the case of cor-

poreal property, as compared with certain kinds of incorporeal, the necessity as against *bonâ fide* third parties of keeping and retaining possession, and not voluntarily permitting the pledgor to take and use the thing as owner, is still strongly asserted in the latest cases. *Siedenbach v. Riley*, 111 N. Y. 560; *Thompson v. Dolliver*, 132 Mass. 103. Where a pledgee was induced by fraud to let the pledgor have temporary possession, and the latter pledged them elsewhere, it was recently held that though the pledgee might have compelled their return, yet the transfer meantime to a *bonâ fide* third party for value obstructed his claim. *Babcock v. Lawson*, 5 Q. B. D. 284; 142 Mass. 76. Cf. *Moors v. Wyman*, 146 Mass. 60 (as against general creditors, where the pledgor goes into insolvency); [1895] App. 56.

What complicates the rule of pledge delivery and retention of possession greatly is the doctrine, now well established, that the agent to keep and hold possession for the pledgee may be the pledgor himself. *Martin v. Reid*, 11 C. B. n. s. 730; *Parshall v. Eggert*, 54 N. Y. 18. But this doctrine must be understood as subject to limitations with reference to third persons misled in consequence and attaching or making *bonâ fide* advances without knowledge of the pledgee's rights. *Schoul. Ballm.* § 193. And see *Thompson v. Dolliver*, 132 Mass. 103; *Casey v. Caveroc*, 96 U. S. 467. By vigilance and seasonable notice of his claim to third parties before they acquire adverse claims upon the thing, the pledgee may preserve his rights unimpaired, even though not retaining strict personal possession thereof. *Palmtag v. Doutrick*, 59 Cal. 154; *Carrington v. Ward*, 71 N. Y. 360.

<sup>1</sup> *Macomber v. Parker*, 14 Pick.



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§ 401. Duty of Pledgee as to taking Care of the Pledge, etc.

—The situation of the parties to a pledge, pending the maturity of the debt which it was given to secure, is next to be considered. By reason of delivery the pledged property is now in the pledgee's keeping; and, being in his keeping, he is bound to exercise ordinary care, as in any bailment for mutual benefit, and is answerable for negligence to a corresponding extent. This is the rule of the civil law and of Continental Europe, as well as that of the common law; and by none of those systems is the pledgee's liability carried further.<sup>1</sup> It was observed in an old case: "If a man bails me goods to keep, and I put them among my own, I shall not be charged if they be stolen."<sup>2</sup> And Sir William Jones thinks that a distinction should be drawn between the taking of the pledge by robbery and stealing or the taking by stealth; and while he admits that in the former instance a pledgee is not chargeable, in the latter instance he considers that the responsibility exists.<sup>3</sup> These are false tests upon any true conception of bailment law, and the views of Judge Story and Chancellor Kent on this point are decidedly preferable; being, in effect, that theft *per se* establishes neither responsibility nor irresponsibility in the bailee; and that the true question in any case of this sort, as in other bailments of the same class, is whether, in view of all the circumstances, there was culpable negligence, or, in other words, the failure on the pledgee's part to exercise due or ordinary care.<sup>4</sup> It certainly appears quite reasonable, if a loss occurs, to presume against the pledgee, and to require of him an explanation at

497; 5 Bing. N. C. 136; Cooper v. Ray, 47 Ill. 53; Schoul. Bailm. §§ 204, 205.

<sup>1</sup> 2 Kent Com. 578; 2 Ld. Raym. 916; Dig. 13, 6, 5, 2; Story Bailm. § 332.

<sup>2</sup> Year Book, 29 lib. assis. 28; Bro. Abr. Bailment, pl. 7.

<sup>3</sup> Jones Bailm. 75.

<sup>4</sup> See Story Bailm. §§ 334-338; 1 Co. Inst. 89 a, which is criticised in part by Story; 2 Kent Com. 580, 581; Schoul. Bailm. §§ 204, 205, and cases

cited; Abbett v. Frederick, 56 How. Pr. 68 (a good case in point). A pledgee who damages a pledge is liable therefor, like any one else who has a special property in goods with a lien and fails to exercise proper diligence; but he does not thereby forfeit the security nor the secured debt. Thompson v. Patrick, 4 Watts, 414. See Ouderkirk v. Central Nat. Bank, 119 N. Y. 263, where want of ordinary care rendered the pledgee liable under the usual bailment rule.

least of his failure to produce in safety, on accomplishment of the pledge undertaking, the property which had been so exclusively within his own keeping; but the explanation once given, and the facts making it appear that the pledgee exercised ordinary care, he is no longer to be treated as liable for the loss.<sup>1</sup> So, too, if the pledge be lost by casualty, or unavoidable accident, or by superior force, or if it perishes from some intrinsic defect or weakness, or naturally, and the loss from such cause be duly made to appear, and no act was done or omitted to be done inconsistent with the pledgee's duty, so that he did not contribute to or proximately cause the loss, the pledgee is not answerable.<sup>2</sup>

The nature of the suit might cause a difference in the method of proof requisite to shift the responsibility from the pledgee's shoulders, and in any case the presumption might shift from either party to the other, or back again; and we may well remember that whether ordinary care was exercised is a question of fact, and that the want of it may be shown by acts of omission as well as of commission; at the same

<sup>1</sup> See *ib.* Story and Kent differ somewhat on the question of a *presumption* of carelessness. As to civil law rule, see Pothier *Traité du Contrat de Nantissement*, n. 31. See, also, Schoul. Bailm. § 205.

<sup>2</sup> Pothier, *supra*; Story Bailm. § 339; 2 Ld. Raym. 909; 2 Kent Com. 579; Scott v. Crews, 2 S. C. x. s. 522; 3 Brewst. 9; Schoul. Bailm. § 204; Girard Fire Ins. Co. v. Marr, 46 Penn. St. 504; Petty v. Overall, 42 Ala. 145.

Ordinary care or diligence bestowed by a pledgee relates mainly to custody. But sometimes the pledge undertaking, from its nature and the circumstances, requires such other acts as collecting pledged negotiable instruments on maturity, presentment so as to charge an indorser, undertaking to realize on book debts as security, &c. So, too, in making a sale on default and otherwise realizing, this legal standard of mutual-benefit

bailments finds an appropriate application. See Schoul. Bailm. §§ 206-208. And see *Lamberton v. Windom*, 12 Minn. 232; *Lawrence v. McCalmont*, 2 How. 426; *Wells v. Wells*, 53 Vt. 1. In such cases ordinary care does not require the pledgee, without his own special agreement to that effect, to spend his money on litigation over defaulted notes, stubborn debts, and the like; but rather to go far enough to test a fair collection and leave further proceedings under the security open for mutual contract, or abandonment on his own part. For a bank as pledgee to neglect presentment of a note so as to charge the indorser is want of ordinary care. 50 Fed. 798. Supine negligence in collecting coupons or in allowing debts to get outlawed may also charge the pledgee. 13 R. I. 40; *Semple Co. v. Detweiler*, 30 Kan. 386.

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time bearing in mind that any one who sues another for negligence has the general burden of proving it.<sup>1</sup>

It may be added that, in employing his own agents about the pledge, the pledgee is answerable like other bailees, within the usual rules of principal and agent, for their negligence.<sup>2</sup> And doubtless every pledgee is bound to observe good faith and honor towards the thing entrusted to his keeping.<sup>3</sup>

§ 402. **Whether Pledgee may use the Pledge.**—Another important inquiry, in this connection, concerns the extent to which the pledgee may make use of the thing pledged to him. Judge Story, relying largely upon the older decisions and *dicta*, sums up the law in five propositions, which are founded in the presumed intent of the pledgor.<sup>4</sup> But such a statement of the law might appear, in these days, not quite consistent with reason, unless accepted with qualifications. Thus, Chancellor Kent evidently thinks that profits, if any, should be applied towards the indebtedness.<sup>5</sup> Such discus-

<sup>1</sup> See Story Bailm. lib.; Beardslee v. Richardson, 11 Wend. 25; Marsh v. Horne, 5 B. & Cr. 322; Tompkins v. Saltmarsh, 14 S. & R. 275. As to this shifting of the burden of proof in bailment suits, which sometimes involves very delicate distinctions, see Schoul. Bailm. § 23.

<sup>2</sup> Schoul. Bailm. § 209; Andros-coggin R. v. Auburn Bank, 48 Me. 335.

<sup>3</sup> Coggs v. Bernard, 2 Ld. Raym. 909; Schoul. Bailm. §§ 209, 210; Story Bailm. § 341. But see § 404, *post*, as to sub-pledge or wrongful transfer by a pledgee.

<sup>4</sup> (1.) If the pledge is of such a nature that the due preservation of it requires some use, such use is not only justifiable, but it is indispensable to the faithful discharge of the pledgee's duty. (2.) If the pledge would be worse for the use, as the wearing of clothes which are deposited, its use is prohibited to the pledgee. (3.) If the pledge is such

that its keeping is a charge to the pledgee, the pledgee may use it by way of recompense (as they say) for the keeping. (4.) If the use will be beneficial to the pledge, or it is indifferent, there it seems that the pledgee may use it; as if the pledge is of a setting dog, it may well be presumed that the owner would consent to the dog's being used in partridge shooting, and thus confirmed in the habits which make him valuable. (5.) If the use will be without any injury, and yet the pledge will thereby be exposed to extraordinary perils, the use is by implication interdicted. Story Bailm. §§ 329, 330, citing Coggs v. Bernard, 2 Ld. Raym. 909, 917.

<sup>5</sup> See 2 Kent Com. 578; Thompson v. Patrick, 4 Watts, 414; Jones Bailm. 81. And though, in the old case of a cow, it was held that the pledgee might milk the cow and use the milk, this was probably on the supposition that it no more and no less than compensated for the care

sions seem unprofitable for practical application and we apprehend they becloud the true principle of the bailment.

In modern times the pledge transaction has become too important to be determined by petty instances. And on the whole, the pledgee's right to use a pledge rests, as we think, on the presumed reasonable intention of the parties and to some extent upon the custom of the times; the general principle being, after all, that the pledge is but a security for the pledgor's debt or engagement, not a thing, on the one hand, to cause the pledgee extraordinary charges, nor, on the other hand, to give him any substantial profit in the mere keeping; but that in the one case, on a final reckoning, the credit goes to the pledgee and in the other to the pledgor. If the pledge consist in good stock, or other valuable securities yielding dividends and profits, or in a herd of cattle, the pledgee certainly cannot avail himself of the dividends or profits save as in discharge *pro tanto* of the debt, and the interest, if any, which accrues thereon, and proper charges, or other satisfaction of the pledge undertaking.<sup>1</sup>

§ 403. **Right of Pledgee to sue Third Parties, Assign, Transfer, etc.**—As to the special property in the pledge by virtue of the bailment, we may observe further that the pledgee has the right to sue not only third persons, but the owner himself, if need be, for wrongfully invading his possessory rights, and that he may recover by replevin or for damages. The measure of damages in a suit against third persons is the full value of the pledge, and not merely the pledgee's own interest, since his ultimate liability to the owner is for the

of the animal and keeping it in health; and any justification of the principle beyond this can only be on the ground that in trivial matters it is not well to try to be too precise. See Schoul. Bailm. §§ 211, 212, for further comments upon Story Bailm. §§ 329, 330. As to others of the above propositions, and particularly the second, it should be said that the line cannot in fairness be strongly

drawn between things which would be and things which would not be injured by the use.

<sup>1</sup> See Schoul. Bailm. 198; Androggin R. v. Auburn Bank, 48 Me. 335. The pledgee of stock may collect and apply dividends to the debt. 8 Mo. App. 118. And see as to coupons, *Whitin v. Paul*, 13 R. I. 40.

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whole pledge; <sup>1</sup> but as against the pledgor and those in privity with him, only his special interest as pledgee.<sup>2</sup>

It is likewise an admitted principle that the pledgee may assign over the pledge (unless in special cases where the transaction is of a personal nature) in order that the assignee may take it subject to all the responsibilities under the original pledge transaction; or he may deliver it into the hands of a stranger for safe custody; or he may convey his interest conditionally by way of pledge to another person; in all of which cases his security is not destroyed or impaired.<sup>3</sup> The right is here more liberally conceded by the law than in the case of a mere lien claimant. But any such act on the pledgee's part is, of course, subject, properly speaking, to all the original restrictions; for to attempt to pledge property beyond the pledgee's own demand, or to make a transfer as though he were the absolute owner, is regarded as a breach of trust and a fraud upon the original pledgor; so that the pledgee's creditor can in general acquire no title in the property beyond that of the original pledgee himself.<sup>4</sup> The consequences, as concerns third persons acting *bonâ fide*, may be more sweeping, in debarring the pledgor from pursuing the thing, it is true, when the pledged property consists of negotiable paper, or perhaps of certain *quasi* negotiable securities; this on principles sufficiently indicated elsewhere.<sup>5</sup>

<sup>1</sup> Story Bailm. § 303; 2 Kent Com. 585; Donald v. Suckling, L. R. 1 Q. B. 585; Adams v. O'Connor, 100 Mass. 515; Harker v. Dement, 9 Gill, 7; Swire v. Leach, 18 C. B. n. s. 479; Schoul. Bailm. § 217; L. R. 3 P. C. 548; 1 Kerr, N. B. 150; United States Express Co. v. Meinto, 72 Ill. 293.

<sup>2</sup> Treadwell v. Davis, 34 Cal. 601; 4 Barb. 491; 13 Ill. 466; Schoul. Bailm. § 217.

<sup>3</sup> Story Bailm. §§ 322-324; Whitaker v. Sumner, 20 Pick. 399; Mores v. Conham, Owen, 123; 2 Kent Com. 579; Shelton v. French, 33 Conn. 489; Schoul. Bailm. § 218.

<sup>4</sup> Ib. And see Belden v. Perkins,

78 Ill. 449; Ashton's Appeal, 73 Penn. St. 153; 37 N. Y. 540.

<sup>5</sup> See "Bills and Notes," *infra*; vol. 2, part iv. c. 1. The general rule as to negotiable instruments is, that one acquiring title *bonâ fide* without notice of infirmity and on valuable consideration is to be protected in his rights, even though the things came to him through some wrongful transfer, and even though they were stolen from the true owner. Ib. As to overdue paper or an instrument whose negotiability appears restricted on inspection, it is otherwise. Even as to *quasi* negotiable instruments, like a bill of lading, the favor thus accorded

§ 404. **The Same Subject.** — But according to many of the latest American cases which follow late English precedents, the pledgee's transfer in breach of trust does not necessarily so impair his security as to give the pledgor a right to reclaim the thing on other or better terms than before the transfer, and regardless of what he owed. Particularly is this true where the breach of trust appears rather a technical one than with a wholly wrongful intent; as if a pledgee should merely sub-pledge or assign over for a greater amount than was due him; and the rule is thus far applied with especial reference to things easily replaced in kind, like marketable stocks and bonds, and where too the third party was not an intentional wrong-doer. A pledgee's over-dealing with the pledge appears thus to be regarded, conformably to the convenient modern practice of recouping damages in a suit, not as utterly annihilating the pledge contract nor as extinguishing his interest in the chattel, but so that the pledgor must tender satisfaction of the pledge before he can recover possession from any such third person for value to whom the pledgee may have transferred it.<sup>1</sup> The rule is, however, to be cautiously asserted; for there are some chattels, as, for instance, valuable paintings, whose pledge might not properly carry an implied right of assigning custody at all to strangers without the pledgor's permission;<sup>2</sup> and it is still barely possible that in a tortious dealing by the pledgee utterly inconsistent with his undertaking, and with the third person in collusion, the pledge contract might be held as terminated in such a sense that the whole bailment security would be wholly lost.<sup>3</sup>

to the *bonâ fide* possessor is not usually allowed. *Shaw v. Merchants' Bank*, 101 U. S. 557. See § 471. And if the third party bought or advanced upon the negotiable instrument with due notice of the infirmity of the title, or if he received it as a gift, he fails of protection within the rule. *Ib.*

<sup>1</sup> *Donald v. Suckling*, L. R. 1 Q. B. 585; *Johnson v. Stear*, 15 C. B. n. s. 338. This is the declared American

rule in various instances. *Talty v. Freedman's Savings Co.*, 93 U. S. 321; 15 Mass. 389; *Lewis v. Mott*, 36 N. Y. 395; *Belden v. Perkins*, 78 Ill. 449; *Schoul. Bailm.* § 219; *First Nat. Bank v. Boyce*, 78 Ky. 42.

<sup>2</sup> *Cockburn, C. J.*, and *Blackburn, J.*, in *Donald v. Suckling*, L. R. 1 Q. B. 585, 615, 618.

<sup>3</sup> *Ib.*

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§ 405. **Pledgor's Right to transfer his Own Interest, etc.**—The pledgor has rights, too, with reference to the pledged property. He may sell or assign his own interest in the pledge, subject to the pledgee's rights, in which case the vendee will stand in the pledgor's place and can redeem the pledge and hold the pledgee to account.<sup>1</sup> So may he pledge and then mortgage the thing; the effect being to make the mortgage a junior incumbrance on the title, somewhat analogous to a second mortgage of real estate.<sup>2</sup> At the common law, goods pawned or pledged and in the pledgee's suitable possession are not liable to execution in an action against the pledgor, so long at least as the pledgee's title remains unextinguished; nor, under like circumstances, to distress for the pledgor's own debt. But in some parts of the United States there are statutes which give to an attaching or execution creditor the right to the proceeds of a pledge to the extent of the pledgor's right to a surplus after satisfying the pledge.<sup>3</sup> A pledgor's bankruptcy or insolvency does not of itself impair the pledgee's security;<sup>4</sup> nor does his death.<sup>5</sup>

§ 406. **True Owner's Rights where the Pledge was wrongful.**—On the general principle of bailments there can be no valid pledge or transfer of title as against the true owner of a thing, who has not personally or by agent, expressly or by implication, assented to the transaction. A bailee's mere possession of goods gives him no power to pledge them for his own debt or engagement and as his own without actual authority from the owner; and whether by wrongful sale or pledge, personal property is not to be held by transfer at common law as against the true owner, without his assent, however incapable of repudiation might be the transaction as between the parties themselves. Hence the true owner

<sup>1</sup> 2 Kent Com. 579; *Franklin v. Neate*, 13 M. & W. 481; *Schoul. Bailm.* § 220; *Story Bailm.* §§ 350, 353; *Goss v. Emerson*, 3 Fost. 38.

<sup>2</sup> *Sanders v. Davis*, 13 B. Mon. 432.

<sup>3</sup> *Swire v. Leach*, 18 C. B. N. s. 479; *Stief v. Hart*, 1 Comst. 20; *Pomeroy v. Smith*, 17 Pick. 85; *Reichenbach v. McKean*, 95 Penn. St. 432; 31 La.

Ann. 865. See *Lamberton v. Windom*, 12 Minn. 232; *Lawrence v. McCalmont*, 2 How. 426; *Schoul. Bailm.* § 221.

<sup>4</sup> *Halliday v. Holgate*, L. R. 3 Ex. 299; *Yeatman v. Savings Institution*, 95 U. S. 764; *Schoul. Bailm.* § 222.

<sup>5</sup> *Bennett v. Stoddard*, 58 Iowa, 654.

may, if seasonable and consistent in his efforts, recover his chattel which another has wrongfully pledged without his permission; and as against him, the pledgee acquires no title, though he had dealt *bond fide* with the pledgor.<sup>1</sup> Nevertheless the rule of a *bond fide* holder for value without notice protects the pledgee of negotiable instruments who can bring himself within that exception.<sup>2</sup> And in various other recent instances the *bond fide* pledgee of other incorporeal instruments, like stock or bills of lading, has been permitted to hold his security on the ground that, of two innocent persons, he should suffer who has held out another, by indorsement or assignment in blank, with the full *indicia* of title as his apparent agent.<sup>3</sup> And, furthermore, it seems fair in modern practice, that any bailee having a lien on the thing for his own charges or advances should be permitted to assign to the extent of his own interest, and that even in case of his overdealing that this right of lien should be recognized.<sup>4</sup>

§ 407. **Remedies of Pledgee on Default of Pledgor.** — We now reach that period where the debt comes due which the pledge was meant to secure. At the common law a pledge does not become the absolute property of the pledgee if it fails of being redeemed by the time agreed upon; on the contrary, the pledgee must resort, in order to avail himself of the pledge, to process of law, or sell or realize his security; and until he has done so the pledgor may, within any reasonable time, redeem it.<sup>5</sup>

<sup>1</sup> *Singer Man. Co. v. Clark*, 5 Ex. D. 37; *Cooper v. Willomatt*, 1 C. B. 672; *Gottlieb v. Hartman*, 3 Col. 53; *Branson v. Heckler*, 22 Kan. 610; *Small v. Robinson*, 69 Me. 425.

<sup>2</sup> See § 403, *supra*, and note.

<sup>3</sup> *Burton's Appeal*, 93 Penn. St. 214; *Stone v. Brown*, 54 Tex. 330; *Cherry v. Frost*, 7 Lea, 1. This doctrine is to be cautiously applied, the more so that in some States a blank indorsement or assignment of such property does not give the holder the full legal *indicia* of title.

As to a sale or transfer on security by a pledgor to a third party when the pledgee is out of possession, see *supra*, §§ 400, 405.

<sup>4</sup> See *First Nat. Bank v. Boyce*, 78 Ky. 42; §§ 398, 404, *supra*.

<sup>5</sup> On ordinary principles, where the pledge is for an indefinite period, the creditor may at any time call upon the debtor to redeem, making for that purpose a suitable demand; but there being no time limited for redemption, the pledgor has, it is said, his own lifetime to redeem,



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The law of pledge has unfolded gradually, and seeks to meet the wants of the times; and at this day we find these three remedies open to the pledgee, after the debt becomes due and while it remains unpaid: (1) to sue the pledgor personally for his debt, without selling the pledge,—a remedy always open, since the pledge, after all, furnishes merely a collateral security; (2) electing to take his remedy upon the pledge, to file his bill in chancery and obtain a judicial sale under a regular decree of foreclosure; (3) as an alternative remedy upon the pledge, to give reasonable notice to the debtor to redeem the pledge and then at his option sell the thing publicly without judicial process at all.<sup>1</sup> Where the pledged property is of considerable value, or various conflicting rights exist, the judicial sale is the safer process; but in small pledges and in general mercantile transactions of this kind the sale without judicial process, which likewise must be fairly conducted, is greatly preferable as being the most expeditious and the least expensive means of realizing satisfaction for what is due. At any rate the pledgee may sue the pledgor personally for the whole debt without resorting to the pledge at all; he may even sue and attach the pledge in his suit; and it is only for his wrong or for his want of ordinary care, that he can be made liable for a loss which occurs through his failure to sell the pledge.<sup>2</sup> In other words, he is bound rather to conduct his sale without negligence than regard with diligence the proper time for making the sale. For it rests usually with the pledgor to suggest when a sale should be made, and press his own in-

unless the creditor meantime calls upon him to do so; and, in default of such call, the right to redeem descends to the pledgor's personal representatives. Lapse of time without special reference to one's life appears the proper barrier, notwithstanding the older books on this point. 2 Kent Com. 581, 582; Glanv. lib. 10, c. 6; *Vanderzee v. Willis*, 3 Bro. C. C. 21; Schoul. Bailm. § 250. The pledgor's right to redeem may be waived or

may be lost by his laches. 6 Mass. 339; Schoul. Bailm. §§ 250, 251.

<sup>1</sup> See *Kemp v. Westbrook*, 1 Ves. 278; Str. 919; *Elder v. Rouse*, 15 Wend. 218; *Tucker v. Wilson*, 1 P. Wms. 261; 2 Kent Com. 582; *Davis v. Funk*, 39 Penn. St. 243; *Story Bailm.* § 310; *Washburn v. Pond*, 2 Allen, 474.

<sup>2</sup> *Story Bailm.* § 310; 2 Kent Com. 582; Schoul. Bailm. §§ 226-248.

terest in equity if the pledgee be dilatory.<sup>1</sup> The pledgee must be circumspect and honorable in his conduct notwithstanding; and unless the case be an extremely urgent one and the transaction be perfectly fair, he cannot take the responsibility of compromising with parties to the security for less than the sum due thereon; for if he does, he is liable to the pledgor for its full value.<sup>2</sup>

§ 408. **Effect of Legislation and Special Contract.**—Local statutes frequently prescribe a specific method for conducting the sale of pledged property where the pledgor has failed to redeem his debt at its maturity, in addition to those remedies which are afforded by law, and the special contract of the parties.<sup>3</sup> The local legislation should always be regarded in this connection.

<sup>1</sup> See *Newsome v. Davis*, 133 Mass. 343; *Granite Bank v. Richardson*, 7 Met. 407; *Schoul. Bailm.* § 244; *Word v. Morgan*, 5 Sneed, 79; *Robinson v. Hurley*, 11 Iowa, 410; 42 Minn. 210.

<sup>2</sup> *Bowman v. Wood*, 15 Mass. 534; *Depuy v. Clark*, 12 Ind. 427; *Garlick v. James*, 12 Johns. 146; *Story Bailm.* § 321; 93 Ill. 458.

The modern tendency is to make the debtor satisfy to the full extent of the security given, notwithstanding the sale be irregular or wrongful; and if the pledgee himself buys in the pledge by collusion or otherwise, the practical effect is that the pledgor may avoid it or may treat it as valid; and in the former instance he may redeem as though no sale had taken place. But it is maintained that the pledgor has no right to take back the goods without paying the debt, notwithstanding a dereliction of duty on the pledgee's part, which does the pledgor no material injury. See *Johnson v. Stear*, 15 C. B. n. s. 330; *Donald v. Suckling*, L. R. 1 Q. B. 585. And the latest English and American doctrine on the subject appears to be that the pledgor cannot treat an irregular sale of the pledge as, *per se*, a wrongful conversion of the property;

but that, as a prerequisite to suing either the pledgee or a third person to whom the pledgee may have transferred the property, he must tender the amount he owes; in short, that, whatever the ground of illegality in the sale, the pledgor can only recover damages over and above the amount of indebtedness on his part. See *Halliday v. Holgate*, L. R. 3 Ex. 299 (1868). See remarks of Willes, J., in *ib.*; *Baltimore Mar. Ins. Co. v. Dalrymple*, 25 Md. 242; *Lewis v. Mott*, 36 N. Y. 395; *Bulkeley v. Welch*, 31 Conn. 339; *Kidney v. Persons*, 41 Vt. 386; §§ 403, 404, *supra*; *Talty v. Freedman's Savings Co.*, 93 U. S. 321.

<sup>3</sup> See Mass. Pub. Sts. c. 192, §§ 10-12; *Schoul. Bailm.* § 248. See 70 Mo. 290. It would seem, from the very nature of the transaction, that where goods are deposited as security for the repayment of a loan of money on a future day certain, though without any express stipulation, the pledgee has a right to sell in default of payment on that day; though if a new agreement be substituted, that agreement must be followed. *Pigot v. Cubley*, 15 C. B. n. s. 702.

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Moreover, as the pledge rests upon the understanding of the parties, it is undoubtedly true that, by a suitable express contract to the effect, pledgor and pledgee may regulate in advance the terms and method of sale, in case the sale should become necessary; and this course is often advisable where the pledgee desires to obtain an ample power of sale. The time for sale may thus be definitely fixed, and the manner of notice prescribed; or, indeed, the notice may thus be waived altogether.<sup>1</sup> If any special agreement exists at all, it must ordinarily regulate the rights of both parties, and neither of them will be allowed to depart from it with impunity; and on ordinary principles of bailment, the express terms of the pledge contract, as to method of keeping, the sale on default, and other particulars, must control, so long as rules of public policy be not transcended.<sup>2</sup>

Public policy, we may remark, by the latest judicial interpretation, permits the pledgee to vary liberally the common-law requirements of a sale. A sale upon fair notice of time and place intended, and public rather than private, is what the common law favors in default; but special contracts have been sustained which allow the pledgee to dispense with notice to sell at public or private sale at his own option and even to buy in for himself.<sup>3</sup> But at all events the pledgor's default must be clearly fixed in one way or another.<sup>4</sup>

<sup>1</sup> Robinson v. Hurley, 11 Iowa, 410; Mowry v. Wood, 12 Wis. 413; Stevens v. Bell, 6 Mass. 339; Rohrie v. Stidger, 50 Cal. 207. The non-judicial sale should ordinarily be a public one, i.e. at auction. But this requirement may be expressly waived by contract. Schoul. Bailm. § 248 and cases therein cited. It is held, moreover, that the rule that a pledgee cannot buy at his own sale may likewise be waived. 70 Mo. 290. But oppressive stipulations will not be enforced; as, for instance, that the pledgee shall become absolute owner on default. Schoul. Bailm. § 249; 35 Mich. 302. As to the *lex commissoria* on this last point, see 2 Kent

Com. 583. See, further, Belden v. Perkins, 78 Ill. 449; Goldsmidt v. Church Trustees, 25 Minn. 202; Union Trust Co. v. Rigdon, 93 Ill. 458, that a special contract is to be fairly and beneficially construed in such cases.

<sup>2</sup> Schoul. Bailm. § 248; 6 Cal. 643; 10 Ga. 208. See, for instance of a rash promise by the pledgor to redeliver absolutely, 117 Mass. 10.

<sup>3</sup> See Schoul. Bailm. § 248. Even though the sale should be irregular in some respects, the pledgor may by his special acquiescence be held to have ratified it. Schoul. Bailm. § 232; 14 R. I. 228.

<sup>4</sup> Demand fixes a default which

§ 409. **How Notes and Various Other Securities should be realized; Collection, etc.** — Where the pledge is a negotiable note, the pledgee has a right to recover and receive the money due upon it, and to sue for it in his own name; and under most circumstances it becomes the creditor's duty to collect a note deposited with him as collateral security, making presentment and giving due notice of non-payment to indorsers.<sup>1</sup> And it has even been held wrongful for one to sell a negotiable note pledged to him instead of collecting it.<sup>2</sup> The reason of this rule appears, however, to be that short-time paper maturing under the pledge contract shall be collected with ordinary diligence, and applied on account, with perhaps an exchange or renewal of securities as they mature.<sup>3</sup> As to marketable bonds not presently redeemable, or long commercial paper, to fall due much later than the maturity of the secured debt or engagement, the presumption that the transaction intended realizing by a sale on default is more reasonable.<sup>4</sup> When mere debts, claims, or money rights, or overdue paper are pledged, circumstances should determine whether a collection rather than sale of them by the pledgee was mutually intended.<sup>5</sup> As to stocks and various other kinds of incorporeal property, peculiar rules may apply.<sup>6</sup>

was uncertain; but otherwise in notes payable on a day certain.

<sup>1</sup> See *Brown v. Ward*, 3 Duer, 660; *Lawrence v. McCalmont*, 2 How. 426; *Lamberton v. Windom*, 12 Minn. 232; *Fisher v. Fisher*, 98 Mass. 303. But, under ordinary circumstances, the holder of a note as security for money lent is not chargeable with a wrongful conversion of it by refusing to deliver it up until the person claiming it pays, or offers to pay, the amount for which it is held. *Benoit v. Paquin*, 40 Vt. 199.

<sup>2</sup> *Markham v. Jaudon*, 41 N. Y. 235; *Schoul. Bailm.* §§ 236-238; *Zimpleman v. Veeder*, 98 Ill. 613. Compromise or sacrifice of a note to the pledgor's detriment is regarded with manifest disfavor by the courts. *Union Trust Co. v. Rigdon*, 93 Ill.

458; *Zimpleman v. Veeder*, 98 Ill. 613; *Schoul. Bailm.* § 238; *Goldsmidt v. Church Trustees*, 25 Minn. 202. Cf. 9 Lea, 63.

<sup>3</sup> *Schoul. Bailm.* § 238.

<sup>4</sup> *Schoul. Bailm.* § 238; 36 Wis. 85; *Alexandria R. v. Burke*, 22 Gratt. 254; *Water Power Co. v. Brown*, 23 Kan. 676. In some cities facilities exist for the sale of long promissory notes as well as of coupon bonds.

<sup>5</sup> *Schoul. Bailm.* § 238; 2 Penn. St. 85; *Rice v. Benedict*, 19 Mich. 132.

<sup>6</sup> See as to the sale of stock (which, of course, a pledgee is not bound to make at his own instance on default) *Schoul. Bailm.* § 234, and cases cited; *Newsome v. Davis*, 133 Mass. 343; *O'Neill v. Whigham*, 87 Penn. St. 394; *Colquitt v. Stultz*, 65 Ga. 306. For enforcing the security

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But the general principle to be applied is, that, whatever be the nature of the security, the pledge contract implies that it shall be put reasonably towards discharging the pledge obligation, in accordance with mutual intent and the good sense of the transaction.<sup>1</sup> And hence each special security is to be realized fairly and naturally, whether by sale, collection, or otherwise, if realized at all.

§ 410. **Miscellaneous Points as to realizing the Security.** — The pledge should cover not only the debt itself, but accumulated interest on the debt, and all necessary expenses incidental to the possession of the pledge by the pledgee; and this seems to include even such interest as may be due on equitable grounds only, through the unjust delay of the debtor in paying up what he owed.<sup>2</sup> So, too, the pledge may, by agreement, be extended to cover subsequent advances, a rule which is subject to some qualifications in favor of third parties; while the better opinion is that, in the absence of evidence showing that the pledge was intended by the par-

of mortgage or title deeds to real estate, see *English v. McElroy*, 62 Ga. 313. And as to realizing on a savings-bank book, see 67 Me. 587.

There is some uncertainty as to whether stocks deposited on what is called a "margin," and brokers' sales generally, are to be treated as strictly pledges or not, the transaction being peculiarly a modern one. Late decisions in New York tend to establish the transaction of sale on "margin" as that of a strict pledge. Such sales on default of the customer to keep his margin good should not be made without notice, nor made oppressively. *Markham v. Jaudon*, 41 N. Y. 235, *Grover and Woodruff, JJ.*, dissenting; *Baker v. Drake*, 66 N. Y. 518. Other States have treated such transactions apparently, though not so clearly, as in the nature of pledge. *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242. But as to the Massachusetts view of such transactions, see *Covell v. Loud*, 135

Mass. 41. And see *Corbett v. Underwood*, 83 Ill. 324, distinguishing executory grain contracts, &c.; *Schoul. Bailm.* § 233.

<sup>1</sup> *Schoul. Bailm.* § 240; *Post v. Tradesmen's Bank*, 28 Conn. 420. Increments of the pledge retained by the pledgee follow the rule of the thing pledged. *Schoul. Bailm.* § 240; *Story Bailm.* § 314.

<sup>2</sup> 2 Kent Com. 583; *Story Bailm.* §§ 306, 357, 358. To be sure the common law furnishes little here to go upon; and our inferences must be drawn mainly from the civil law and the general course of reasoning; though where the parties make an express contract, or submit to some well-established usage to aid them in these respects, it is certain that the courts will make such contract or usage the test. See *Story ib.*; 1 Dom. b. 3, tit. 3; *Story Eq. Jur.* § 1034; *Somes v. British Empire Shipping Co.*, 8 H. L. Cas. 338; *Schoul. Bailm.* §§ 249, 250.

ties to serve as collateral security for a loan subsequent to that for which it was originally given, the pledgee must restore it upon full satisfaction of the original debt.<sup>1</sup> Whenever the thing is pledged to the same creditor for two or more debts, and the pledge when sold will not suffice to pay them in full, the proceeds of the sale are naturally applied proportionally to all the debts to extinguish them *pro tanto*, if the creditor suffers no special disadvantage thereby. But the law leaves appropriation of payments largely to a creditor's own choice, as we have elsewhere seen.<sup>2</sup> Where, again, several things are pledged, each, by the civil law, and probably by the common law as well, is deemed liable for the whole debt; and the pledgee may proceed to sell them from time to time till the whole debt is completely discharged;<sup>3</sup> and here his choice is liberal as among them, though there can be but one satisfaction.<sup>4</sup>

If the property pledged be insufficient to pay the whole debt, together with incidental expenses, the surplus constitutes a personal charge against the debtor or other contracting party, and may be recovered against him.<sup>5</sup> But if, on

<sup>1</sup> *United States v. Hooe*, 3 Cr. 73; *Pettibone v. Griswold*, 4 Conn. 158; 2 Kent Com. 584; 1 Atk. 236; *Jarvis v. Rogers*, 15 Mass. 389. Personal property pledged for a particular loan cannot, in absence of special agreement, be held by the pledgee for any other advance. *Duncan v. Brennan*, 83 N. Y. 487. But the original pledge transaction may give to the security, by its own terms, a very generous scope. See § 397; 147 Mass. 344. The rule of the civil law in this respect is a matter of doubt; and the most, perhaps, that can be said in the pledgee's favor, is that, where no rights of creditors or purchasers for a valuable consideration have intervened, the circumstance of making a subsequent loan while holding the pledge might go far towards establishing in courts of equity a presumption, subject of course to rebutting

testimony, that the pledge was mutually designed to secure both the subsequent and the original loan; so desirable is it deemed to avoid circuity of action in these days. See *Gilliat v. Lynch*, 2 Leigh, 493; 2 Vern. 691; *Adams v. Claxton*, 6 Ves. 226.

<sup>2</sup> *Herkimer Manuf. &c. Co. v. Small*, 21 Wend. 273; *Blackstone Bank v. Hill*, 10 Pick. 129; *Story Bailm.* § 312; *Wilcox v. Fairhaven Bank*, 7 Allen, 270; *supra*, § 371.

<sup>3</sup> *Story Bailm.* § 314; 1 Dom. Civ. Law, b. 3, tit. 1.

<sup>4</sup> *Schoul. Bailm.* §§ 241, 242; *Union Bank v. Laird*, 2 Wheat. 390; *Fitzgerald v. Blocker*, 32 Ark. 742.

<sup>5</sup> *Story Bailm.* § 314; *Yelv.* 178; 6 Mass. 339; 1 Dom. b. 3, tit. 1; *Schoul. Bailm.* §§ 241, 242; *Stokes v. Frazier*, 72 Ill. 428; *Faulkner v. Hill*, 104 Mass. 188.

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the other hand, the creditor has obtained entire satisfaction, and there is a surplus remaining, this surplus belongs (saving the claims of a paramount owner) to the pledgor, or to subsequent lien parties in his right, and the pledgee must account accordingly.<sup>1</sup>

§ 411. **Pledgee may sue the Pledgor instead of enforcing the Security.** — The pledgee, of course, is not in general obliged to sell or realize the pledge on maturity of the debt which it was designed to secure; nor does the pledge become his absolute property through the simple failure of the pledgor to pay off his indebtedness at the appointed time. If the pledgee fails to enforce his right to sell, the thing remains a mere pledge as before; and he is bound, under these circumstances, to restore it whenever full payment and satisfaction of the debt is tendered.<sup>2</sup>

Here we may add that the pledgee's remaining remedy on his pledgor's default is to sue the pledgor personally on his debt or engagement. For the mere taking of security imports no agreement to pursue the security first.<sup>3</sup>

§ 411 *a*. **Pledgor's General Right to redeem.** — A pledgor is entitled to a prompt and honorable restoration of his pledged property, or (if left for collection) of its proceeds, whenever the pledgor has fulfilled or offered to fulfil the secured engagement or has made payment or tender of all that was due from him under the bailment, within the scope of debarment already noticed.<sup>4</sup> And so sedulous of his rights becomes the law, when the pledgor's duty has been rendered, that upon his tender at the appointed day, or any other rightful tender, the pledgee must surrender the pledge or stand liable for conversion, unless he can show good reason for his denial.<sup>5</sup>

<sup>1</sup> Van Blarcom v. Broadway Bank, 37 N. Y. 540; Hancock v. Franklin Ins. Co., 114 Mass. 155; Rohrlé v. Stidger, 50 Cal. 207; 14 Wis. 331; Schoul. Bailm. § 242.

<sup>2</sup> Kemp v. Westbrook, 1 Ves. 278; 1 Bulst. 29; Story Bailm. § 346.

<sup>3</sup> Schoul. Bailm. § 246; 2 Kent Com. 582. He may attach the pledged property in his suit. Whitwell v.

Brigham, 19 Pick. 117; 11 Met. 226; Arendale v. Morgan, 5 Sneed, 703. But if he attaches, he abandons his lien as pledgee. 68 Iowa, 460.

<sup>4</sup> Schoul. Bailm. §§ 250, 252.

<sup>5</sup> Ib. § 253; Talmage v. New York Bank, 91 N. Y. 531; 90 N. Y. 442; Fisher v. Brown, 104 Mass. 259. Tender of the debt after maturity extinguishes the lien of the pledge, and

§ 412. **How the Contract of Pledge becomes extinguished; Extension, etc.**— We need hardly say that the contract of pledge becomes extinguished, according to universal principles, by the full payment of the debt, and discharge of the engagement so secured. And since debts are extinguished not only by payment, but by satisfaction in some other way, the substitution of new security, or release and waiver, it will be readily inferred that the contract of pledge may be extinguished likewise in a corresponding variety of ways.<sup>1</sup> But there may be renewal or extension of the secured debt; or a substitution of one security for another; and here the intent of the parties determines the transaction.<sup>2</sup>

§ 413. **Business of Pawnbrokers, etc.**— There are many statutes to be found in England and this country which regulate and in a measure restrain the business of pawnbrokers; a class of persons who seem to have been always in bad odor as rapacious plunderers, for the most part, with little respect for usury laws, and yet the respected kinsmen of petty debtors.<sup>3</sup> Loaning large sums on collateral security, as, for instance, by advancing on bills of lading or railways and other marketable bonds and securities, is becoming at the present day, however, a matter of constant and increasing practice among capitalists, trust companies, and moneyed institutions; while even corporations are not unfrequently chartered in the different States for the express purpose of carrying on the old-fashioned pawnbrokers' business. These pawners' banks not only afford to poor people a ready means of borrowing money at fair rates of interest, but pay their shareholders reasonable dividends on a very safe business besides.<sup>4</sup>

the pledgor may recover the pledge or its value, directly or by set-off, without keeping his tender good or bringing the money into court. 17 Fed. 776.

<sup>1</sup> Story Bailm. §§ 359-365; Pigot v. Cubley, 15 C. B. n. s. 702; *supra*, §§ 365-369; Schoul. Bailm. §§ 252, 263.

<sup>2</sup> Schoul. Bailm. § 263.

<sup>3</sup> See Fisher's Digest (English), "Pawnbroker and Pledge."

<sup>4</sup> The subject of Pledge is naturally treated at length in works on Bailment; for Pledge is properly a branch of the law of Bailments. In Story Bailments may be found a fair treatise on this topic; but while the distinguished author was alive, the law of pledge had but incompletely developed, especially with reference to giving incorporeal chattels in security. Schouler Bailments, Part IV. c. 4, is devoted to a full exposi-



## CHAPTER VI.

### DEBTS SECURED BY MORTGAGE ; CHATTEL MORTGAGES.

§ 414. **Debt on Mortgage Security to be considered; Mortgages in General.** — The last kind of secured debt to be considered is that of the debt which is secured by mortgage. As we have elsewhere said, mortgages may be of real estate or of personal property ; and a mortgage debt before foreclosure is to be classed with personal property.<sup>1</sup> But chattel mortgages, or mortgages made with a chattel as the security, continue personal property throughout. For this reason, and because of the circumstance that works on real-estate law treat very fully and appropriately of real-estate mortgages, we shall confine our attention in the present chapter to chattel mortgages or mortgages of personal property.

Let us then inquire, *first*, what constitutes a chattel mortgage ; *second*, what it gives in security and secures ; *third*, the rules of delivery, registry, and priority of title ; *fourth*, the general rights and liabilities of the parties concerned ; and *fifth*, the foreclosure and redemption of chattel mortgages.

§ 415. **As to what constitutes a Chattel Mortgage.** — And, *first*, as to what constitutes a chattel mortgage. There appears to be no substantial difference between the mortgage of real and of personal property, except that a mortgage being in its nature a transfer of title, the laws respecting the necessity of accompanying possession and the instruments of transfer are not in both cases the same. There is less of technicality pertaining to the law of the latter than of the former subject ; the occasions for applying to equity for re-

tion of the law of Pledge or Collateral Security as recognized to-day. Mr. Leonard A. Jones, the author of various works upon Personal Securi-

ties, has recently (1883) issued a volume upon this subject.

<sup>1</sup> *Supra*, § 60.

lief are fewer; and the topic itself is of rather recent growth, as compared with that of real-estate mortgages, which dates far back into the black-letter days of the common law.

The form of a chattel mortgage is usually much like that of a mortgage of real estate. A note for the amount of the debt is given, and a deed is executed to secure that note, which is known as the mortgage deed. This deed begins by an absolute bill of sale of the goods (corresponding to a conveyance of lands) with covenant of warranty; the goods being properly described in the instrument. Then follows a proviso that if the note, debt, or other obligation (reciting it) shall be duly paid by the mortgagor, his executors, administrators, and assigns, then the sale or conveyance shall be void; otherwise, to remain in full force and effect; and provisos are frequently added as to the possession of the property before and after default, and the particular remedies which the mortgagee shall have in the latter event.<sup>1</sup> In other words, there is a simultaneous sale or absolute transfer with a proviso by way of defeating it; and these two parts go to make up a mortgage. The mortgagee becomes, technically speaking, owner of the property in the common law sense, subject to a condition of the transfer being defeated on the performance of a certain thing by the mortgagor. The thing mortgaged becomes thus irredeemable in law, though equity or statute may confer a right of redemption and require a formal foreclosure.

§ 416. **The Same Subject; Mortgage distinguished from Lien or Pledge.**—Mortgages of chattels, then, are to be distinguished at common law from liens and pledges in this sort of out-and-out transfer of the title conditionally which is carried by the original transaction; whereas in the other instances the secured party is admitted to be a mere bailee or temporary owner having possessory rights. If the condition be not performed, the property is absolutely and indefeasibly that of the mortgagee under a mortgage; and courts of law look at no other owner; while courts of equity have done quite little here as compared with their constant inter-

<sup>1</sup> For form of such chattel mortgage, see Curtis's Conveyancer, 2d ed.

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position where real-estate mortgages are concerned, to control and mould legal doctrines for themselves.<sup>1</sup> Legislation, however, accomplishes much towards assimilating the two species of property in modern times, and equity subjects all mortgages to foreclosure and a possible right of redemption; the fundamental intent of giving security in such a transaction is regarded; so that pending full performance it can hardly be said that the secured party has an available and complete *jus disponendi*. A chattel mortgage, in its primary sense, is a kind of dead or dormant pledge as compared with an ordinary pledge, though likewise a security for debt; and the mortgage security is, in general, designed to secure the payment of a debt, or the fulfilment of an engagement, and to become void if the debt is paid, or the engagement performed, according to the terms agreed upon at the outset. The two essential parties to the mortgage transaction are the *mortgagor*, usually a borrower, and the *mortgagee*, usually a lender.<sup>2</sup> The possession of the property by the party to be secured is not so necessary here as in the case of a pledge or pawn; for an actual or constructive change of possession better comports with the pledge transaction; and *vice versa*, where no possession passes under the terms of the security, the mortgage transaction rather is complied with.<sup>3</sup>

<sup>1</sup> And hence this practical difference has widely obtained as between mortgages of real estate and mortgages of personal property; that those of the former kind follow the equity rule regardless of form, so as to confer no legal title at once upon the mortgagor, but to serve rather as security merely until breach of condition; whereas those of the latter kind pass the legal title at once to the mortgagee, subject to defeasance, agreeably to the legal rule. See *Jones Chattel Mortgages*, § 1.

<sup>2</sup> See *Maugham v. Sharpe*, 17 C. B. x. s. 464; *Flory v. Denny*, 7 Ex. 581; *Coggs v. Bernard*, 1 Smith Lead. Cas. 298; *Bank of Rochester v. Jones*, 4

Comst. 497; *Doak v. Bank of State*, 6 Ire. 309; *Conard v. Atlantic Ins. Co.*, 1 Pet. 387.

<sup>3</sup> For the distinction between pledge and mortgage, see further, *Schoul. Bailm.* §§ 167, 168, and cases cited; *Coty v. Barnes*, 20 Vt. 78; *Woodman v. Chesley*, 39 Me. 45; *Smith v. Beattie*, 31 N. Y. 542; 33 E. L. & Eq. 413; *Thompson v. Dolliver*, 132 Mass. 163; *Jones Chatt. Mort.* §§ 4-7; *Janvrin v. Fogg*, 49 N. H. 340. Apart from the question of changing possession, if the transaction for security imports the mere giving in security with no immediate change of title, it will be presumed a pledge rather than a mortgage;

§ 417. **The Same Subject; Mortgage distinguished from Sale, etc.; Essential Test.** — But mortgages, again, are to be distinguished from sales with a contract for repurchase; for there is a sort of unity or closeness in the present kind of transaction which does not characterize the other. Intention of the parties is here and in other personal property transactions strongly upheld; and often a bill of sale or transfer absolute on its face has been shown to be intended only for a pledge or mortgage, by some other writings or even by mere conduct of the parties and parol evidence. And it will not be concluded that parties meant a regular conditional sale, where the facts tend rather to establish the creation of a security.<sup>1</sup>

while, on the contrary, if it assumes to transfer the legal title at once to the creditor or obligee, perhaps with terms of defeasance, and yet so that the title shall become absolute in him through the other's mere non-performance of his condition, there is a mortgage instead of a pledge. Schoul. Bailm. § 167, and cases cited; Leach v. Kimball, 34 N. H. 568; Brewster v. Hartley, 37 Cal. 15; cases *supra*.

That a conditional transfer of title is essential to a chattel mortgage, see Jones Chatt. Mort. §§ 8-18, commenting upon cases somewhat conflicting, decided in our several States.

<sup>1</sup> Williamson v. Culpepper, 16 Ala. 211; Caswell v. Keith, 12 Gray, 351; Houser v. Kemp, 3 Penn. St. 208; Smith v. Beattie, 31 N. Y. 542; Fuller v. Parrish, 3 Mich. 211; Schoul. Bailm. § 169; 73 Mo. 477; 3 Col. 551. At law the legal effect of a written instrument cannot be altered or varied; though the rule is here applied very loosely; and equity maxims seek to discover the real intention of such transactions. See Jones, § 21.

The line of distinction in these days as stated in the courts is often quite shadowy; and as business parties draft their own instruments

of security, it may sometimes be hard to say whether a particular transaction is really a pledge or a mortgage. See Wilson v. Little, 2 Comst. 443; Brewster v. Hartley, 37 Cal. 15; 27 N. Y. 364; Murdock v. Columbus Ins. Co., 59 Miss. 152. On the whole, however, where a construction is required from the courts, the judicial preference seems to be in favor of a pledge, since in such transactions for security the law is more clearly defined, and the mutual rights of parties upon a default better protected than under a chattel mortgage. See 11 Fed. Rep. 19. A chattel mortgage, moreover, imports greater solemnity of form in these days, suitable for registration under local statute. See § 148. But mutual intention of the parties governs in such issues. A broader line of practical demarcation would be in cases of collateral security between secured parties in possession and secured parties out of possession; as in the Roman *pignus* and *hypotheca*. Schoul. Bailm. § 168.

A reservation in a bill of sale, or note, of a lien for purchase-money, constitutes no mortgage, but only a lien by express contract. Jones Chatt. Mort. §§ 11-13, and cases cited; Gushee v. Robinson, 40 Me. 412; Shaw v. Wilshire, 65 Me. 485;

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A decisive test of a legal mortgage of personal property is, on the whole, the use of language which makes the instru-

*Metcalf v. Fosdick*, 23 Ohio St. 114; *Groton Man. Co. v. Gardiner*, 11 R. I. 626; 5 S. C. 280. An instrument by which one agrees to sell and the other to purchase certain personal property at a specified price, and that the vendor shall have a lien upon the property till the purchase-price is paid, is sometimes considered to be in the nature of a chattel mortgage. *Dunning v. Stearns*, 9 Barb. 630; *Macomber v. Parker*, 14 Pick. 497. Even a bill of sale which is absolute on its face may be found affected by a parol agreement of the parties that the property shall be held as security for the payment of a debt due the nominal vendee, and so the bill of sale takes the character of a chattel mortgage and no more. *Smith v. Beattie*, 31 N. Y. 542; *Acker v. Bender*, 33 Ala. 230; *McFadden v. Turner*, 3 Jones, 481; *Carter v. Burris*, 10 S. & M. 527. But see *Montany v. Rock*, 10 Mo. 506. In some States very strict proof is required to defeat a bill of sale in this manner. See *Williams v. Cheatham*, 19 Ark. 278; *Colvard v. Waugh*, 3 Jones Eq. 335; *Sewell v. Price*, 32 Ala. 97. And see *Fowler v. Stoneum*, 11 Tex. 478. A defeasance cannot be engrafted upon a conveyance of personal property by parol. *Pennock v. McCormick*, 120 Mass. 275. Courts of equity sometimes speak of an "equitable mortgage" of chattels, which is to be upheld. *Smithurst v. Edmunds*, 1 McCarter, 408; *Donald v. Hewitt*, 33 Ala. 534. A deed with a proviso for the privilege of redeeming the property conveyed imports *prima facie* that it is intended as a security, and not a sale. *Wilson v. Weston*, 4 Jones Eq. 349. And see *Plummer v. Shirley*, 16 Ind. 380. Of course, where a bill of sale is executed, and

an instrument of defeasance, besides, as part of the same transaction, or something equivalent, the two must be construed together; and, so construed, they constitute a mortgage. *Carpenter v. Snelling*, 97 Mass. 452; *Taber v. Hamlin*, ib. 489; 74 Tex. 239; *Blake v. Corbett*, 120 N. Y. 327. Otherwise where the defeasance was subsequent, and not in fulfilment of the original transaction. *Freeman v. Baldwin*, 13 Ala. 246; *Jones Chatt. Mort.* § 19. Equity often disregards technical expressions in instruments, in order to give effect to the real intent of parties in this respect; and whether in courts of law or equity the question of sale, mortgage, or pledge is largely determined, as a matter of law, from the circumstances and proof of each case. See *Woodman v. Chesley*, 39 Me. 45; *Coty v. Barnes*, 20 Vt. 78; *Whiting v. Eichelberger*, 16 Iowa, 422. And the true test appears to be, as against a conditional sale, that of some transfer of title, subject to complete defeasance; as against a pledge, that of some transfer of title, which in case of non-performance of the condition becomes absolute at law in the transferee by its own terms. Cases *supra*; *Parshall v. Eggart*, 52 Barb. 367; *Wright v. Ross*, 36 Cal. 414. And see also, as to transactions treated as effecting a mortgage, *Scott v. Henry*, 13 Ark. 112; *Barfield v. Cole*, 4 Sneed, 465; *Locke v. Palmer*, 26 Ala. 312; U. S. Dig. Mortgage, 48, 49; *Cooper v. Brock*, 41 Mich. 488.

But, in numerous instances, what might appear to many a chattel mortgage has been treated by the courts as a conditional sale instead. Thus, a sale of lumber by an instrument in writing, on condition that the seller may repurchase it at the same price,

ment one of a sale conveying the title of the property in so conditional a sense, that the sale shall be defeated by the debtor's performance of his agreement; and that if he does not perform the creditor shall have the title absolutely.<sup>1</sup>

§ 418. **Form of Chattel Mortgage; Parol Mortgage, etc.**—Mortgages of real estate are either *legal* or *equitable*; that is, the parties directly intended a mortgage transaction, and made their instrument accordingly, or else they failed to make a proper instrument, while their conduct and acts were such as led to the same practical result. Now, a mortgage of personal property may be effected in a variety of ways; the legal requirements being much less formal than in the case of real estate. Thus, a conveyance, which is a legal essential in passing the title of real estate, is no such essential so far as concerns personal property; for which reason it is a general maxim, that chattel mortgages will operate (in the absence of controlling statutes) to transfer title in the mortgaged property, even if there be no instrument under seal, and no writing whatever.<sup>2</sup> Though the instrument be made in the form of a deed and have no seal, it is, irrespective of legislation, a sufficient mortgage.<sup>3</sup> Instances are to

on or before a certain day, is not a mortgage, but a sort of conditional sale. *Lee v. Kilburn*, 3 Gray, 594. So, too, is it with other transactions where a sale is made, accompanied by an agreement for a repurchase upon performance of specified conditions. See *Magee v. Catching*, 33 Miss. 672; *Grant v. Skinner*, 21 Barb. 581; *Gushee v. Robinson*, 40 Me. 412. And wherever the intent is manifested that the title shall not pass in a sale, but remain "exclusively vested" in the seller, and not vest in the purchaser, unless prior to a certain date the latter fully pays the purchase-money, here is no mortgage created. *Plummer v. Shirley*, 16 Ind. 380. Courts of equity lean rather against conditional sales, because the consequence of error in construing a conditional sale into a

mortgage is not so injurious as that which would change a mortgage into a conditional sale. *Locke v. Palmer*, 26 Ala. 312; *Barnes v. Holcomb*, 12 S. & M. 306.

In some States the fusion of equity and the common law is more complete than in others; and hence the disposition to look beyond forms to discover the intent may not be uniformly manifested in such distinctions. See *Jones Chatt. Mort.* §§ 14-16.

<sup>1</sup> *Jones Chattel Mortgages*, § 8; 59 Hun, 282; *Campbell v. Iron Co.*, 83 Ala. 351.

<sup>2</sup> *Flory v. Denny*, 7 Ex. 581; 11 E. L. & Eq. 584; *McTaggart v. Rose*, 14 Ind. 230; *Sweetzer v. Mead*, 5 Mich. 107; *Jones Chatt. Mort.* §§ 34-39.

<sup>3</sup> *Gerrey v. White*, 47 Me. 504. And see *Partridge v. Swazey*, 46 Me. 414;

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be found where a mortgage made by word of mouth is supported as to the parties and some others.<sup>1</sup> In certain States statutory forms are prescribed, though not in an exclusive sense; an affidavit or an acknowledgment is sometimes additionally required; and an instrument of plain and regular form is always preferable in these days as establishing the character and terms of the transaction, and so as to conform to local requirements of registration which one out of possession needs to make his security good against all third parties.<sup>2</sup>

§ 419. **Matters of Description in a Mortgage.**—We have said that the mortgage of a chattel is in general for some debt which is expressed by a promissory note and that to such note and its terms the mortgage deed usually refers. A note so secured, whether payable on time or on demand, expresses for itself when the condition of the mortgage shall be deemed broken or fulfilled. But if the mortgage secures the payment “according to its tenor” of a promissory note

U. S. Dig. Suppl. Mortgage, 424; *Gibson v. Warden*, 14 Wall. 244; *Jones Chatt. Mort.* § 102. A partner can make a chattel mortgage; and if he does so and adds a seal, that seal does not take away his authority, or in any way change the force of the instrument. *Sweetzer v. Mead*, 5 Mich. 107; *Milton v. Mosher*, 7 Met. 244. See *Randall v. Baker*, 20 N. H. 335.

<sup>1</sup> See *Brooks v. Ruff*, 37 Ala. 371; *Watson v. James*, 15 La. Ann. 386. A separate piece of paper containing a list of articles, and attached by wafer to the mortgage, is presumed to have been annexed before execution of the mortgage. *Belknap v. Wendell*, 1 Fost. 175. As to certificate of acknowledgment or oath sometimes required by statute, see *Sowden v. Craig*, 26 Iowa, 156; *Stone v. Marvel*, 45 N. H. 481. See further *Jones Chatt. Mort.* §§ 34–39; U. S. Dig. 1st Series, Mortgages, 4403–4416.

While at common law a valid mortgage of personalty may be made without writing, there must be a writing

to satisfy the Statute of Frauds in case there is no delivery, and the value of it is \$50 or more. As to other local statutes requiring the filing or recording of the mortgage, see § 425, *post*. And see *Jones Chatt. Mort.* § 2, and cases cited. A verbal mortgage comes seldom before the courts in these days. Delivery would often be deemed essential to its validity; and if the thing were delivered it would more naturally be presumed a pledge. See 18 Hun, 187; 66 Barb. 433. But cf. *Morrow v. Turney*, 35 Ala. 131.

A parol agreement to give a chattel mortgage upon which money has been advanced may be enforced in equity as between the parties themselves; but *aliter* as to creditors and *bona fide* purchasers without notice. *Morrow v. Turney*, 35 Ala. 131; 52 Ala. 96; *Conchman v. Wright*, 8 Neb. 1; *Jones Chatt. Mort.* § 3.

<sup>2</sup> See *Jones Chatt. Mort.* § 34; *supra*, § 415.

payable at a day certain and already overdue, the condition will be understood to be the payment of the note in its then existing state,—or virtually on demand.<sup>1</sup> If no particular time is specified for the payment of a sum secured by mortgage, “a reasonable time” will be understood.<sup>2</sup> The debt which the mortgage makes a charge upon the property is that which is described in the condition of the deed, and in case of discrepancy the recital under that condition will govern.<sup>3</sup>

It is not necessary, as between the parties themselves at least, that the personal property should be so described in the mortgage as to be capable of identification by the written recital or name alone, for parol evidence is here admissible to fully identify.<sup>4</sup>

But property not fairly and specifically included under the mortgage cannot be thus brought within its protection nor substituted;<sup>5</sup> and the mortgage relied upon without delivery should as to third parties enable them, with the aid of such inquiries as the instrument itself suggests, to identify the chattels covered.<sup>6</sup> In short, any mortgage, in order to be effectual as against third parties, ought to identify in some

<sup>1</sup> *Pettis v. Kellogg*, 7 Cush. 456.

<sup>2</sup> *Farrell v. Bean*, 10 Md. 217. That such mortgage is not necessarily given to secure a debt, see § 422, *post*.

<sup>3</sup> *Kaysing v. Hughes*, 64 Ill. 123.

<sup>4</sup> *Jones Chatt. Mort.* §§ 53, 64, 66; *Harding v. Coburn*, 12 Met. 333; *Wagner v. Watts*, 2 Cranch, C. C. 169; *Tindall v. Wasson*, 74 Ind. 495; 9 Barb. 630; 7 Met. 354; *Conkling v. Shelley*, 28 N. Y. 360.

<sup>5</sup> *Jones Chatt. Mort.* §§ 62, 67; *Hutton v. Arnett*, 51 Ill. 198; *Van Evera v. Davis*, 51 Iowa, 637; *Sharpe v. Pearce*, 74 N. C. 600. Mistakes of date may be cured by parol evidence. *Partridge v. Swazey*, 46 Me. 414.

<sup>6</sup> *Winter v. Landphere*, 42 Iowa, 471; *Connally v. Spragins*, 66 Ala. 258; *Jones Chatt. Mort.* §§ 54, 55, and cases cited; *Lawrence v. Evarts*, 7 Ohio St. 194; *Tindall v. Wasson*,

74 Ind. 495. A schedule may be annexed, but this does not enlarge the scope of the mortgage. *Ex parte Jardine*, L. R. 10 Ch. 322; *Jones Chatt. Mort.* § 75; *Burditt v. Hunt*, 25 Me. 419; *Webb v. Stone*, 4 Fost. 282.

A defective description may be cured by a subsequent actual delivery of the property to the mortgagee, as against persons who have not meantime acquired *bonâ fide* interest in the thing. *Parsons Savings Bank v. Sargent*, 20 Kan. 576; 3 Lea, 527. And see *Jones Chatt. Mort.* §§ 53-78, and cases cited. In many States quite a liberal rule of construction is applied to descriptions partially erroneous or imperfect. See *Van Heusen v. Radcliff*, 17 N. Y. 580; *Pettis v. Kellogg*, 7 Cush. 456.



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way the subject-matter to which it relates; whether by describing the property definitely or by plainly stating its location.<sup>1</sup>

§ 420. **What does a Chattel Mortgage give in Security.** — We now ask *secondly*, what does a chattel mortgage give in security or secure? As to what may be given in security, it appears to be a rule that whatever kind of property is capable of being absolutely sold or pledged may likewise be mortgaged. And hence rights in remainder and reversion, "*choses in action*," so called, and incorporeal property generally, may be mortgaged as well as things corporeal, and chattels real as well as chattels personal; also, under equity rules, may contingent debts or liabilities, if not mere possibilities, as well as debts due and certain.<sup>2</sup>

§ 421. **The Same Subject; Rule as to Future-acquired Property.** — The question how far a chattel mortgage may be made to cover future-acquired property has undergone considerable discussion in the courts, and the decisions are not uniform. But the distinction appears to be correctly taken between the product of property which the mortgagor owns at the time of his mortgage, and property to which the mortgagor has no right at the time of the mortgage, either actual or potential, but in which he expects to acquire some title at a future day. In the latter case the mortgage cannot make an effectual transfer; but in the former it may.<sup>3</sup> In instances such as the wool growing on a flock of sheep,

<sup>1</sup> Jones, §§ 54, 54 *a*; Adams v. Ryan, 61 Iowa, 733; Adamson v. Hortin, 42 Minn. 161; Grounds v. Ingram, 75 Tex. 509.

<sup>2</sup> 2 Story Eq. Jur. § 1012; 4 Kent Com. 144; Russell Road, *in re*, L. R. 12 Eq. 78; Carleton v. Leighton, 3 Mer. 667; Conard v. Atlantic Ins. Co., 1 Pet. 387. And see vol. ii. *post*, pt. vi. c. 1; *supra*, §§ 395, 396, as to pledge. But causes of action growing out of a personal wrong cannot be mortgaged. Pindell v. Grooms, 18 B. Monr. 501. Property exempt from attachment may be mortgaged as well as pledged; for the exemption is only

a privilege of which an owner is not compelled to avail himself. Love v. Blair, 72 Ind. 281. See also Jones Chatt. Mort. § 174, and cases cited.

<sup>3</sup> See Holroyd v. Marshall, 10 H. L. Cas. 191; Gardner v. McEwen, 19 N. Y. 123; Story Eq. Jur. § 1040; Lunn v. Thornton, 1 M. Gr. & S. 379; Conderman v. Smith, 44 Barb. 404; Jones v. Richardson, 10 Met. 481; Harding v. Coburn, 12 Met. 333; Jenckes v. Goffe, 1 R. I. 511. Where live-stock is mortgaged, the natural increase and produce of the stock become also subject to the mortgage. Forman v. Proctor, 9 B. Monr. 124.

the produce of a dairy, unfinished articles of manufacture upon which labor is subsequently expended, without substantially changing their character or value, a mortgage embracing after-acquired chattels has been upheld, and the mortgage has taken effect upon the thing acquired as soon as the thing comes into existence. Some of the cases go further than this; and machinery or stock to be subsequently added to machinery or stock which is likewise mortgaged, have been carried to the mortgagee even as against third parties; though we may find even here that the mortgagee had taken possession of the property before any other lien attached; a circumstance of itself entitled to much weight.<sup>1</sup>

Ordinarily, under our modern local statutes at least, and on common-law principles, a chattel mortgage would not apply to goods which are not in existence, or not capable of being identified at the time, nor to goods which are to be purchased and procured, to replace those intended to be sold, nor to after-acquired chattels generally; and stipulations on the mortgagor's part to this effect amount usually to nothing more than an executory agreement which, as against third parties more especially, and those acquiring an adverse interest in the thing, requires the subsequent and seasonable execution of a new mortgage. For as a rule a mortgage of future-acquired property is void *per se* at law as against third parties in adverse interest, unless the mortgagee takes actual possession of such property before any adverse interests have fastened upon it, or obtains constructive priority under a new mortgage.<sup>2</sup>

The main difficulty results from the circumstance that

<sup>1</sup> Walker v. Vaughn, 33 Conn. 577; State v. Tasker, 31 Mo. 445; Titus v. Mabee, 25 Ill. 257; Farmers' Loan, &c. Co. v. Commercial Bank, 11 Wis. 207, explaining Chynoweth v. Tenney, 10 Wis. 397; Chapman v. Weimer, 4 Ohio St. 481. And see Belding v. Read, 3 H. & C. 955; Reeves v. Whitmore, 9 Jur. n. s. 1214.

<sup>2</sup> See Barnard v. Eaton, 2 Cush. 294; Codman v. Freeman, 3 Cush.

306; Ranlett v. Blodgett, 17 N. H. 298. And see Mowry v. White, 21 Wis. 417; Hamilton v. Rogers, 8 Md. 301. The mortgage of a customer's future possible accounts is not good against third persons. Purcell v. Mather, 35 Ala. 570. See also Jones Chatt. Mort. §§ 138-169, and cases cited, where this subject is exhaustively presented.

equity asserts a rule more favorable to the mortgagee out of regard to the true intent of the transaction. While in equity the mortgage of future-acquired chattels does not pass the title completely, it nevertheless creates in the mortgagee an equitable interest; and this equitable interest is upheld as against judgment creditors and others, upon the theory that the mortgage, though inoperative as an instrument, operates to transfer the beneficial interest to the mortgagee as soon as the property is acquired; the mortgagor, if need be, becoming a trustee for the mortgagee before the latter takes personal possession of the thing.<sup>1</sup> But at all events, the policy of our registry laws requires that the written chattel mortgage shall clearly express its intention where after-acquired property is to be covered by it.<sup>2</sup>

The circumstance that one attempts to mortgage property which he does not possess will not invalidate the mortgage as regards property which he actually possesses.<sup>3</sup>

<sup>1</sup> *Holroyd v. Marshall*, 10 H. L. Cas. 191, settles this doctrine for the English courts in a case which applied to the subsequent annexation or substitution of certain machinery. And see *Lazarus v. Andrade*, 5 C. P. D. 318. Such was the rule sustained by Mr. Justice Story still earlier, in *Mitchell v. Winslow*, 2 Story, 630. And to that conclusion is the general tendency of the latest American decisions. See *Beall v. White*, 94 U. S. 382; *McCaffrey v. Woodin*, 65 N. Y. 459; and various other cases cited, *Jones Chatt. Mort.* § 173, showing that in Massachusetts and Wisconsin at least this rule has not been favored.

Authority to the mortgagee to enter and seize after-acquired chattels creates no equitable interest *per se*. *Reeve v. Whitmore*, 4 De G. J. & S. 1. Nor can a valid lien in equity be created upon goods not specifically defined by the instrument creating the lien. *Belding v. Read*, 3 H. & C. 955; *Tadman v. D'Epineuil*, 20 Ch. D. 758. See further *Jones Chatt. Mort.* §§ 170-175. Railway mort-

gages usually cover after-acquired property. *Ib.* § 175.

<sup>2</sup> *Lormer v. Allyn*, 64 Iowa, 725; *Montgomery v. Chase*, 30 Minn. 132.

<sup>3</sup> *Gardner v. McEwen*, 19 N. Y. 123; *Voorhis v. Langsdorf*, 31 Mo. 451. We may add that the mortgage of a specific number of articles of a particular kind in a place where other like articles are kept will confer upon the mortgagee a right of selection. *Call v. Gray*, 37 N. H. 428. And although the thing mortgaged be repaired and changed, the identity of the thing remaining, and its value not being materially increased, the right of property in the mortgagee is not thereby altered. *Comins v. Newton*, 10 Allen, 518; *Putnam v. Cushing*, 10 Gray, 334; *Crosby v. Baker*, 6 Allen, 295. Moving the mortgaged goods from one place to another does not destroy the mortgagee's title, though it might increase the difficulty of establishing them as the goods covered by his mortgage. *Whelden v. Wilson*, 44 Me. 1. The fact that the goods mortgaged were in part

§ 422. **What does a Chattel Mortgage secure.** — Usually a distinct indebtedness described in a promissory note which forms part of the mortgage transaction is secured. But a mere contingent indebtedness may be thus secured: for in either a real estate or personal mortgage the condition need not be for the payment of any definite sum of money.<sup>1</sup> Indeed it is not essential that the mortgage should secure any payment whatever, for it may secure the performance of any obligation on the mortgagor's part.<sup>2</sup> As between mortgagor and mortgagee the recitals of a mortgage may establish a consideration in a suit involving title to the thing; but where a mortgage appears *prima facie* fraudulent as to creditors, the mortgagee should be able to show some legal and valid consideration.<sup>3</sup> Parol evidence is admissible to show the purpose for which a chattel mortgage was executed, or to identify a note intended to be secured by it; nor is the full expression of consideration essential in the mortgage instrument, provided the transaction be *bond fide* established and the description be such that inquiry *aliunde* would enable subsequent creditors to ascertain the extent of the incumbrance.<sup>4</sup>

perishable does not necessarily avoid the mortgage. *Googins v. Gilmore*, 47 Me. 9. Nor that the value of the mortgaged goods has greatly increased since the date of the mortgage, especially if they were mortgaged when in an unfinished state. *Perry v. Pettingill*, 33 N. H. 433. And see *Comins v. Newton*, 10 Allen, 518. As to a sufficient description of things in an unfinished state, see *Lawrence v. Everts*, 7 Ohio St. 194.

<sup>1</sup> *Goddard v. Sawyer*, 9 Allen, 78; *Treat v. Gilmore*, 49 Me. 34; 56 Barb. 21; *Robinson v. Hill*, 15 N. H. 477; *Byram v. Gordon*, 11 Mich. 531.

<sup>2</sup> *Ib.*; *Hellyer v. Briggs*, 55 Iowa, 185; *Jones Chatt. Mort.* §§ 79-83. As to taking such security as guarantor, see *Preble v. Conger*, 66 Ill. 370.

<sup>3</sup> *Tift v. Barton*, 4 Denio, 171;

*Kranert v. Simon*, 65 Ill. 344; *Jones Chatt. Mort.* §§ 80, 81. A mortgage may be valid though the security be not wholly for the mortgagee's benefit. *Morse v. Powers*, 17 N. H. 286; *Jones Chatt. Mort.* § 84. As to the rule of *bond fide* party for value against the true owner of property, as applied here, see *Jones Chatt. Mort.* § 81; *Tiffany v. Warren*, 37 Barb. 571; *Thompson v. Van Vechten*, 27 N. Y. 568; *Craft v. Russell*, 67 Ala. 9.

<sup>4</sup> *McKinster v. Barbock*, 26 N. Y. 378; 17 Hun, 391; *Jones Chatt. Mort.* §§ 89, 90, 96; *Partridge v. Swazey*, 46 Me. 414. But a mortgage which gives a totally false description of the security cannot be relied on at law, for the instrument should, if proper, be reformed in equity. *Jones*, § 88.

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A chattel mortgage made to secure future advances is valid; and in general a debt which is wholly future may be secured and not merely a present or a pre-existing debt.<sup>1</sup> Nor need the amount of intended advances be stated in the mortgage instrument, if the purpose be described with reasonable certainty.<sup>2</sup> But to give effect to such a mortgage as against a *bond fide* purchaser, judgment creditor, or intervening lien-claimant, the mortgagee should be able to show that he has made the contemplated advances or incurred the liability mentioned and that the debt or liability is still outstanding;<sup>3</sup> for advances made after the mortgagee has actual notice that others have acquired *bond fide* rights for value in the property will be postponed to them, unless the circumstances made it essential that the mortgagee should extend the risks which his security was intended to protect.<sup>4</sup> A mortgage cannot in general be extended so as to cover advances not contemplated at the time of its execution; for this is matter for a new mortgage between the parties which regards the intervening priorities of others.<sup>5</sup> Nor can a mortgage securing a debt of a fixed amount or description be so extended as to become a lien for another and different indebtedness not so expressed.<sup>6</sup> But the rule has been that a mortgage need not show on its face that it was meant to comprehend future dealings and indebtedness, since creditors may be put to their own inquiry on such points;<sup>7</sup> yet it is better and safer to express the idea in the mortgage instrument.

§ 423. **Mortgages made under a Qualified Title, etc.** — It is not necessary that the mortgagor should have the absolute

<sup>1</sup> Jones v. Guaranty Co., 101 U. S. 622; 71 N. Y. 610; Barnard v. Moore, 8 Allen, 273; Speer v. Skinner, 35 Ill. 282; Ackerman v. Hunsicker, 85 N. Y. 43; Jones Chatt. Mort. § 94; Lawrence v. Tucker, 23 How. 14; Googins v. Gilmore, 47 Me. 9; 43 Neb. 224. Local statute may affect this rule. See 40 N. H. 253.

<sup>2</sup> Jarratt v. McDaniel, 32 Ark. 598. A false description should be reformed in equity before legal remedies may be pursued. See Follett v. Heath,

15 Wis. 601; Webb v. Stone, 4 Fost. 282.

<sup>3</sup> Jones Chatt. Mort. § 94.

<sup>4</sup> Franklin v. Meyer, 36 Ark. 96; Speer v. Skinner, 35 Ill. 282; 66 Ill. 370; Davenport v. McChesney, 86 N. Y. 242; Jones Chatt. Mort. §§ 94, 97.

<sup>5</sup> Davenport v. McChesney, 86 N. Y. 243; 33 Barb. 24.

<sup>6</sup> Jones, § 91; Mueller v. Provo, 80 Mich. 475; 36 Minn. 200.

<sup>7</sup> Jones, § 96.

title to property which is the subject-matter of the mortgage;<sup>1</sup> though the usual rules prevail as to a paramount owner whose assent, express or implied, has not been given.<sup>2</sup> So may the owner of a chattel not in possession (as, for instance, where he has already pledged it or a bailee has a lien upon it) make a valid mortgage of the thing subject to a pre-existing pledge or lien; in which case notice to the pledgee or lien-claimant perhaps (or a registry of the instrument) would be proper.<sup>3</sup> And there may be a prior and junior mortgage of the same chattel.<sup>4</sup>

One in possession of property under a conditional sale may mortgage his interest, such as it is, and on payment of the price the mortgage will become valid.<sup>5</sup> On the other hand a vendor who has sold chattels conditionally may mortgage his own interest.<sup>6</sup>

§ 424. **Mortgage should conform to Legislative Policy, etc.** — Transactions of this character should be entered into *bonâ fide*, and, like any other contract, should not only be entered into by competent parties by way of mutual agreement, but conform to good morals and legislative policy.<sup>7</sup>

<sup>1</sup> Jones Chatt. Mort. § 114; Ponder v. Rhea, 32 Ark. 435; Leland v. Sprague, 28 Vt. 746.

<sup>2</sup> *Supra*, § 406; Stanley v. Gaylord, 1 Cush. 536; 13 Barb. 372; Glaze v. Blake, 56 Ala. 379. As to subsequent ratification by the true owner, see Jones Chatt. Mort. § 119; 112 Mass. 250.

<sup>3</sup> Jones Chatt. Mort. § 115; Pindell v. Grooms, 18 B. Mon. 501; Case v. Woleben, 52 Iowa, 389.

<sup>4</sup> Smith v. Coolbaugh, 21 Wis. 427.

<sup>5</sup> Crompton v. Pratt, 105 Mass. 255; Jones Chatt. Mort. § 117. And see Holman v. Lock, 51 Ala. 287.

<sup>6</sup> Everett v. Hall, 67 Me. 497; Jones Chatt. Mort. § 118.

So, too, as to a mortgage of chattels by one holding possession under a lease for a purchase by instalment, see Chase v. Ingalls, 122 Mass. 381; 117 Mass. 324. And as to other

interests in personal property which may become absolute by perfecting some executory contract, see Jones Chatt. Mort. § 117; Forman v. Proctor, 9 B. Mon. 124.

<sup>7</sup> Thus a mortgage made to secure a debt for spirituous liquors would, under the statutes of some States, be void. See Brigham v. Potter, 14 Gray, 522. But see Trott v. Irish, 1 Allen, 481. But the party out of possession of property illegally mortgaged by him occupies the worse position for seeking to recover it. Bagg v. Jerome, 7 Mich. 145. And see § 398. By the statutes of some States a mortgage founded in usury is void or voidable. Thompson v. Van Vechten, 27 N. Y. 568. See chapter *supra*, on Interest and Usury. And legislation sometimes requires the debt, liability, or agreement to be strictly between mortgagor and

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§ 425. **Rules of Delivery, Registry, etc.; Local Statutes require Registry.** — *Thirdly*, we are to consider the rules of delivery, registry, and priority of title. And here we find that legislation essentially alters much of the common law pertaining to chattel mortgages, and requires certain formalities to be pursued, without which a mortgagee's title is at least precarious as regards the mortgagor, and of no avail against third parties whose *bond fide* rights may have intervened. To pursue the details of the later American legislation in this respect would be unprofitable; and scarcely less so to recount the numerous decisions which constantly arise under the registration acts of the different States. But it may be generally stated that the object of this legislation is not so much to guard or affect the reciprocal rights of mortgagor and mortgagee, as to prevent subsequent purchasers, incumbrancers, and attaching creditors from being imposed upon by their joint artifice and fraud. Transfers of interests in chattels, when made without some delivery, actual or symbolical of the thing, are very objectionable, even though the parties to the transaction be content to have it so; for the original owner, who has incumbered his property, may thus

mortgagee. *Parker v. Morrison*, 46 N. H. 280. And see *Belknap v. Wendell*, 11 Fost. 92. There should be the assent of both parties to the transaction; for which reason a mortgage made by a debtor, without the creditor's knowledge or assent, is held to be inoperative. *Oxnard v. Blake*, 45 Me. 602; *Welch v. Sackett*, 12 Wis. 243. Nor can a mortgage hold, which is "made with the intent to hinder, delay, or defraud creditors," — both parties participating in this design, — according to the general policy of English and American legislation. *Rich v. Levy*, 16 Md. 74; *Stein v. Hermann*, 23 Wis. 132; *Meixsell v. Williamson*, 35 Ill. 529; *Conkling v. Shelley*, 28 N. Y. 360.

In a few States statutory restrictions are placed upon the subject-

matter of chattel mortgages. See *Jones Chatt. Mort.* §§ 121, 122. As to the mortgage of fixtures, see *supra*, §§ 114, 124; *Jones Chatt. Mort.* §§ 123-137.

Contests between mortgagees and attaching creditors over chattels are frequently so sharp and bitter that it behooves one who takes any by way of mortgage security to have a good instrument drawn up, and to see that the property given in security and the thing to be secured are both plainly described and clearly identified in it. The essential question is quite apt to be one of honest intention in such cases; written expressions may make this honest intention manifest, while general and misleading descriptions in a mortgage ought to throw a doubt over a mortgagee's title where other creditors contest it.

keep up a fictitious credit, and peril the interests of those with whom he deals outside, by appearing to their eyes the same continuous owner.

Hence is it that our local statutes now make it essential for chattel mortgages to be in writing and formally executed, in order to prevail against such interested third parties without notice; and furthermore require, in absence of delivery of the property to the mortgagee, that this instrument be duly spread out upon the public records. The recording or filing of a mortgage is generally equivalent to a change of possession under such legislation. In this aspect, then, the law of chattel mortgages comes to resemble more closely than ever that of real-estate mortgages; and it is customary in these days for registry and non-possession before default to characterize one class of these transactions as well as the other.<sup>1</sup> Notice by record is made effectual by such legisla-

<sup>1</sup> Making allowance for the many shades of difference in our State legislation, it may be said, generally, that these statutes require either registry or delivery of the goods in order to make the mortgage hold; but not usually both registry and delivery. And the place of record is usually where the mortgagor resides, or where he resides and has his place of business. *Call v. Gray*, 37 N. H. 428; *Langworthy v. Little*, 12 Cush. 109; *Henderson v. Morgan*, 26 Ill. 431; *Bevans v. Bolton*, 31 Mo. 437; *Weed v. Standley*, 12 Fla. 166; *Rood v. Welch*, 28 Conn. 157; *Kuhn v. Graves*, 9 Iowa, 303; *Rich v. Roberts*, 50 Me. 395; *Matlock v. Straughn*, 21 Ind. 128; U. S. Dig. Mortgage, 49. And see *Jones Chatt. Mort.* §§ 248-274, where the cases are considered at length; *Stewart v. Platt*, 101 U.S. 731. As to registry under English statutes, see *Keith v. Burrows*, 1 C. P. D. 722. The subsequent removal of the mortgagor to a new place does not make a new record necessary in such place. *Brigham v. Weaver*, 6 Cush. 298; *Barrows v.*

*Turner*, 50 Me. 127; *Jones*, § 260. And see *Smith v. McLean*, 24 Iowa, 322. See, further, *Vaughn v. Bell*, 9 B. Monr. 447; *Fowler v. Merrill*, 11 How. 375; *Oxnard v. Blake*, 45 Me. 602; *De Courcey v. Little*, 4 Green (N. J.), 115. As to the date when the record takes effect, see *Holmes v. Sproul*, 31 Me. 73; *Handley v. Howe*, 22 Me. 560; *Craig v. Dimock*, 47 Ill. 308. For formalities connected with the record, and the recording officer's duties, see *Head v. Goodwin*, 37 Me. 181; *McLarren v. Thompson*, 40 Me. 284; *McCord v. Cooper*, 30 Ind. 9; *Jordan v. Farnsworth*, 15 Gray, 517; *Swift v. Hall*, 23 Wis. 532; *Case v. Jewett*, 13 Wis. 498; *Porter v. Dement*, 35 Ill. 478; *Woodruff v. Phillips*, 10 Mich. 500; *Jones Chatt. Mort.* § 248.

Limitations as to the value or the species of secured property requiring record are to be found in some of the statutes. See *Newby v. Hill*, 2 Met. (Ky.) 530; *Bither v. Buswell*, 51 Me. 601. And see, as to mortgage of a legacy, *Marsh v. Woodbury*, 1 Met. 436.



tion from the time that the instrument is left for record at the proper office ; and such record notice charges the public and gives full priority to the mortgage.<sup>1</sup> And in some States the mortgage ceases to be valid against subsequent purchasers of the property in good faith, and lien-creditors of the mortgagor, after the expiration of a certain period from the original filing for record, unless it is registered anew.<sup>2</sup>

§ 426. **The Same Subject; Effect of Unrecorded Mortgage.**—The registry of an instrument operates as constructive notice of title. Now it is a familiar principle of equity that actual notice to any interested party will dispense with a constructive notice; and in some States it is held that any existing creditor or purchaser, who has actual notice of a prior unrecorded chattel mortgage, can claim no priority on the ground that the mortgage was not registered.<sup>3</sup> But the

<sup>1</sup> *Miller v. Whitson*, 40 Mo. 97; *Parker v. Palmer*, 13 R. I. 359; *Jones Chatt. Mort.* § 270; 25 Minn. 81.

Statutes of our States relating to the record of chattel mortgages are sometimes extended expressly to ships and vessels. *Ætna Ins. Co. v. Aldrich*, 20 N. Y. 92. But in general the United States registry acts here apply, and State record is presumably dispensed with. See *supra*, c. 1; *Wood v. Stockwell*, 55 Me. 76; *Veazie v. Somerby*, 5 Allen, 280.

A mortgage imperfectly acknowledged is rendered invalid as against subsequent purchasers and creditors of the mortgagor, by the statute rule of some States. *Jones Chatt. Mort.* § 248; *Frank v. Miner*, 50 Ill. 444. A mortgage which embraces both real and personal property ought to be recorded twice in conformity with the registry laws respectively applicable to real and personal property. *Jones Chatt. Mort.* § 279. But separate instruments of mortgage would be here desirable. See *Stewart v. Beale*, 68 N. Y. 629. As to recording a mortgage of fixtures, see *Jones*, § 281. And as to recording a sched-

ule which forms part of the chattel mortgage, see 19 Me. 167; *Chapin v. Cram*, 40 Me. 561.

<sup>2</sup> See *Dillingham v. Bolt*, 37 N. Y. 198; 3 Kern. 556; 27 N. Y. 568; *Wetherell v. Spencer*, 3 Mich. 123; *Paine v. Mason*, 7 Ohio St. 198; *Edson v. Newell*, 14 Minn. 228; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Jones Chatt. Mort.* §§ 286-298. Delivery of a chattel mortgage for record will not avail, if both execution and delivery were for absent parties who were thus made mortgagees without their knowledge. *Welch v. Sackett*, 12 Wis. 243.

<sup>3</sup> *Smith v. Zurcher*, 9 Ala. 208; *Lewis v. Palmer*, 28 N. Y. 271; *Allen v. McCalla*, 25 Iowa, 464; *Hathorn v. Lewis*, 22 Ill. 395. Actual notice, to be effectual, should be notice of all which the statute requires to be recorded. *Sawyer v. Pennell*, 19 Me. 167. Actual notice may be proved by facts and circumstances; but the burden is upon the party alleging actual notice to show it. *Rogers v. Pierce*, 12 Neb. 48; 58 N. H. 198, 295; *Jones Chatt. Mort.* §§ 309, 310.

practice in this respect is not uniform; for in various States such legislation declares, that an unrecorded mortgage or even a recorded mortgage imperfectly executed, cannot avail even against purchasers with actual notice, if the goods remain in the mortgagor's possession;<sup>1</sup> and under any circumstances the rule is frequently made a matter of mere statute construction.<sup>2</sup>

But as concerns mortgagor and mortgagee, and all parties other than subsequent purchasers or incumbrance and lien creditors of the mortgagor, it is quite different. A mortgage of personal property on proper consideration may be pronounced good as between the parties to it without any record or change of possession, inasmuch as it amounts at all events to an executory agreement which is obligatory and ought to be enforced.<sup>3</sup> A mortgage furthermore is good between the parties to it, although it does not conform to such statute requirements as relate to the record or execution of the instrument.<sup>4</sup> At present, however, under the policy of our State legislation, either an actual delivery of the mortgaged goods to the mortgagee, or a record of the mortgage, is usually made essential to perfect the title in him, though rarely are both deemed necessary; and as to a written instrument of mortgage, this is so important that in some States a delivery of chattels as collateral security without any written instrument conformable to the statute, would not be regarded as a mortgage at all.<sup>5</sup> Any delay in recording a chattel mortgage does not, however, as a rule, affect its validity as between the parties to the transaction, or with

<sup>1</sup> *Rich v. Roberts*, 48 Me. 548; *Travis v. Bishop*, 13 Met. 304; *McCourt v. Myers*, 8 Wis. 236; *Wilson v. Milligan*, 75 Mo. 41; *Wilson v. Leslie*, 20 Ohio St. 161; *Lockwood v. Slevin*, 26 Ind. 124; *Jones Chatt. Mort.* § 314. Under some statutes notice of a mortgage not filed does not affect creditors, but does affect subsequent purchasers and mortgagees. 25 Barb. 484; *Sayre v. Hewes*, 32 N. J. Eq. 652; *Jones Chatt. Mort.* § 318.

<sup>2</sup> See *Jones Chatt. Mort.* §§ 308-318, and cases cited.

<sup>3</sup> See U. S. Dig. Mortgage, Suppl. 423; *Johnson v. Jeffries*, 30 Mo. 423; *supra*, § 418.

<sup>4</sup> *Jones Chatt. Mort.* § 237, and cases cited.

<sup>5</sup> See *Day v. Swift*, 48 Me. 368; *Wooster v. Sherwood*, 25 N. Y. 278; *Call v. Gray*, 37 N. H. 428; *Byram v. Gordon*, 11 Mich. 531; *Hodgson v. Butts*, 3 Cr. 140; preceding section.

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reference to utter strangers or wrong-doers ; but the mortgage continues ineffectual only as against intervening purchasers or incumbrancers and creditors with lien ;<sup>1</sup> and (as we have seen the rule to be in certain States) only of any such of these as have had no actual notice in season.<sup>2</sup> General creditors without a lien on the thing could not impeach such mortgage except as being fraudulent or as giving an unrighteous preference under a bankrupt or insolvent law.<sup>3</sup>

One of two things, however, the mortgagee should do to make his title complete, — either cause the mortgage to be recorded, or else take possession of the property, as he has a right to do ; supposing, besides, that he has already had the mortgage instrument itself delivered to him or his agent. When the registry acts are duly complied with, or possession is taken by the mortgagee, the mortgage becomes valid and operative so as to protect the mortgaged property from creditors not having already made a levy of execution or attachment, and subsequent purchasers from the mortgagor.<sup>4</sup>

§ 427. *Delivery and Possession, etc., without Registry, etc.*

— What change of possession, then, will suffice to render the mortgagee's title complete without a record of the mortgage ? The answer must be, such change as the property admits of ; and this will depend upon circumstances, as, for instance, the

<sup>1</sup> Westcott v. Gunn, 4 Duer, 107 ; Evans v. Herring, 3 Dutch. 243 ; Pratt v. Harlow, 16 Gray, 379 ; Coe v. Columbus, &c. R. R. Co., 10 Ohio St. 372.

<sup>2</sup> See qualifications of this rule in preceding section, under the statutes of some States.

<sup>3</sup> Thompson v. Van Vechten, 27 N. Y. 568 ; Jones Chatt. Mort. § 245.

<sup>4</sup> See Brown v. Webb, 20 Ohio, 389 ; Single v. Phelps, 20 Wis. 398 ; Bank of Rochester v. Jones, 4 Comst. 497 ; Morrow v. Turney, 35 Ala. 131 ; Fromme v. Jones, 13 Iowa, 474 ; Sawyer v. Turpin, 91 U. S. 114 ; Jones, § 237. The recording or filing of a mortgage being generally equivalent to a change of possession, the party claiming under it is relieved of the

burden of proving the *bonâ fides* of the transaction. Jones Chatt. Mort. § 236, and cases cited ; Morrill v. Sanford, 49 Me. 566 ; Robinson v. Elliott, 22 Wall. 513 ; Coles v. Clark, 3 Cush. 399. An unfiled or unrecorded mortgage is valid against the mortgagor's executor or administrator, just as it is valid against the mortgagor himself. Jones Chatt. Mort. § 239 ; Gill v. Pinney, 12 Ohio St. 38. The same rule seems to be preferable as concerns the insolvent estate of a living or dead mortgagor, where no fraud is shown in fact. Jones, §§ 239, 240, 241 ; Stewart v. Platt, 101 U. S. 731 ; 95 U. S. 764. But see, for decisions to the contrary, Jones Chatt. Mort. §§ 240, 242.

nature of the property and its situation.<sup>1</sup> A mortgagee has been deemed in actual possession as against attaching creditors of the mortgagor, where he has placed a keeper over the mortgaged goods, though concealing somewhat the purpose of the keeper's presence out of regard for the mortgagor's family; or where some other stranger has taken possession as the mortgagee's agent, notwithstanding the goods are still left on the mortgagor's premises.<sup>2</sup> Mortgaged property may in general be delivered to and kept by a *bonâ fide* agent of the mortgagee.<sup>3</sup> No formal ceremony is essential. But where mere words of delivery are used, and the goods continue upon the mortgagor's premises, either under his personal charge or that of his own former agent, no sufficient change of possession, generally speaking, takes place as against the public.<sup>4</sup> And to satisfy the usual legal requirements, chattels mortgaged under an instrument which is not recorded ought not only to be taken into the mortgagee's possession, but kept there.<sup>5</sup> A mortgagee's possession, to be

<sup>1</sup> Fry v. Miller, 45 Penn. St. 441; Morse v. Powers, 17 N. H. 286.

<sup>2</sup> See Morse v. Powers, 17 N. H. 286; Laffin v. Griffiths, 35 Barb. 58; Carpenter v. Snelling, 97 Mass. 452.

<sup>3</sup> *Ib.*; McPartland v. Read, 11 Allen, 231; 32 Me. 233; Jones v. Swayze, 42 N. J. L. 279; Jones Chatt. Mort. § 180. If a third person be already in possession, his consent to hold as the mortgagee's agent suffices for delivery. Jones Chatt. Mort. § 183; Ancona v. Rogers, 1 Ex. D. 285.

<sup>4</sup> Menzies v. Dodd, 19 Wis. 343; Doak v. Brubaker, 1 Nev. 218; Doyle v. Stevens, 4 Mich. 87; Pickard v. Marriage, L. R. 1 Ex. D. 364; Steele v. Benham, 84 N. Y. 634. This is the reasonable rule, because possession continued by the mortgagor or his agent is usually a badge of fraud, or at least misleads the public. But under some exceptional circumstances, consistently with perfect good faith, and particularly where lien creditors or *bonâ fide* purchasers are not affected,

a mortgagee is permitted to make the mortgagor his agent to keep possession, as in the case of a pledge. See Jones Chatt. Mort. § 181; Turner v. Killian, 12 Neb. 580; Dayton v. People's Savings Bank, 23 Kans. 421. Concurrent possession by mortgagor and mortgagee is not to be favored, as against third persons, without at all events seasonable notice by the mortgagee of his rights. See Flagg v. Pierce, 58 N. H. 348; Jones, § 185.

<sup>5</sup> See Parshall v. Eggart, 52 Barb. 367; Wright v. Tetlow, 99 Mass. 397; Hickman v. Perrin, 6 Cold. 135; Look v. Comstock, 12 Wend. 244; Hage v. Campbell, 78 Wis. 572. A change of possession of part under the unrecorded mortgage will usually protect the mortgage lien as to that part. Jones Chatt. Mort. § 179; Stewart v. Smith (Iowa), 14 N. W. Rep. 310. But the burden to prove delivery or a change of possession is upon the person who claims to hold under an unrecorded mortgage. McCarthy v. Grace, 23 Minn. 182.

effectual against the public, ought to be actual, honest, and open.<sup>1</sup>

The mortgagee of personal property, in all cases where there is no special agreement restraining the right of control on his part, may possess himself of the property whenever he wishes; and unless liens have meantime attached to the goods while in the mortgagor's hands, his right in this respect cannot be lawfully resisted.<sup>2</sup> It is not uncommon for a chattel mortgage to provide in terms that the mortgagee may take possession whenever he deems the debt insecure, in which case the mortgagee has the immediate right of possession; and mortgages of this kind will be upheld generally, if honestly made and recorded in due form.<sup>3</sup> But, again, it is frequently stipulated that the mortgagor shall retain possession until default of payment; nor are such stipulations fraudulent or against the policy of the law, — though here it would be well to add a provision in the mortgage that in case the chattels, or any part thereof, shall be attached at any time by any person before payment of the money secured, or in case the mortgagor shall attempt to sell them without the mortgagee's consent, then the latter shall have the right to take immediate possession of the whole property to his use.<sup>4</sup>

<sup>1</sup> *State v. Benham*, 84 N. Y. 634; *Anderson v. Brenneman*, 44 Mich. 198. Constructive or verbal possession is not to be favored in such cases. Delivery is not completed while a condition precedent continues unfulfilled. 54 Ill. 155; 2 Gray, 195; *Jones Chatt. Mort.* §§ 186, 187.

<sup>2</sup> *Whisler v. Roberts*, 19 Ill. 274; *Foster v. Perkins*, 42 Maine, 168; *Coty v. Barnes*, 20 Vt. 78; *Sawyer v. Turpin*, 91 U. S. 114; *Mitchell v. Black*, 6 Gray, 100.

At common law a mortgage valid against lien creditors could only be made by a delivery of the property; and one intent of the registry statutes was to do away with this necessity and give even greater notoriety to the transaction, where record was made. Usually, then, delivery of pos-

session or record is needful. *Jones Chatt. Mort.* § 176. But the mortgagee may rightfully take possession before any other right or lien attaches. *Ib.* § 178. All such statements are, of course, subject to legislative expressions on this point; for in some States either an *immediate* delivery of the property, or a record of a chattel mortgage, is made indispensable. *Ib.*; *Wallen v. Rossman*, 45 Mich. 333.

<sup>3</sup> *Frost v. Mott*, 34 N. Y. 253; *Frisbee v. Langworthy*, 11 Wis. 375.

<sup>4</sup> For the interpretation to be given to such stipulations as the above, see *Welch v. Whittemore*, 25 Maine, 86; *Whitney v. Lowell*, 33 Maine, 318; *Prior v. White*, 12 Ill. 261; *Woodman v. Chesley*, 39 Maine, 45; *Babcock v. McFarland*, 43 Ill. 381.

§ 428. **Want of Delivery as a Badge of Fraud.** — But the want of a delivery and continuous change of possession in mortgaged chattels will usually, as respects third parties with lien claims, or those who *bonâ fide* purchase or advance upon the property, raise a presumption of fraud. Such a presumption may commonly be rebutted; and the issue of good faith and honest dealing on the part of mortgagor and mortgagee in any such case belongs rather to a jury than the court. Thus the modern English doctrine, and that more generally adopted by American courts, is that possession by either a vendor or a mortgagor is only *primâ facie* a badge of fraud, and does not exclude explanations to the contrary.<sup>1</sup> Such possession by a mortgagor is an unfavorable circumstance; but irrespective of the registry laws it may be shown to be consistent with honesty in the transaction.<sup>2</sup> And the fact that the mortgagor's possession is expressly provided for by the terms of the instrument, appears generally sufficient to overcome the presumption of fraud which might otherwise arise; subject, however, to registry statutes.<sup>3</sup>

<sup>1</sup> Jones Chatt. Mort. § 320, and numerous cases cited.

<sup>2</sup> Conard v. Atlantic Ins. Co., 1 Pet. 386; Jones Chatt. Mort. §§ 325, 326, and cases cited.

<sup>3</sup> D'Wolf v. Harris, 4 Mason, 515; Barrow v. Paxton, 5 Jones, 258; Stix v. Sadler, 109 Ind. 254; Jones Chatt. Mort. § 323.

Other frauds under the statutes of Eliz. and at common law are often considered in connection with chattel mortgages and voluntary conveyances. See Jones Chatt. Mort. §§ 333-351. Fraudulent preferences under bankrupt and insolvent laws are likewise treated in this connection. *Ib.* §§ 356-366.

Any arrangement between mortgagor and mortgagee which would leave the former in practical control of the property, with its beneficial enjoyment and the right of disposal, is highly objectionable; far more open to the suspicion of fraud than a mere

possession in the mortgagor; and where such arrangements can be sustained under any circumstances, they are most likely on the ground that the mortgagor was disposing of the property only as the mortgagee's agent, and for applying of the satisfaction of the security whatever might be realized. But the rule to be applied in cases of this sort is well stated as follows: Where a mortgage instrument contains illegal provisions, and such as are not reconcilable, on any possible hypothesis, with an honest or legal intent, the law declares it void upon its face, because no evidence could change its character. The cases in which this absolute and unchangeable presumption arises are not numerous. There are other cases in which, upon the face of the instrument, a statutory presumption arises which is only *primâ facie* evidence of fraud. And there are still more cases in which the whole illegality charged

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§ 429. **Priority among Chattel Mortgages.** — Priority between unrecorded mortgages is generally determined by priority of execution.<sup>1</sup> The effect of registry legislation, however, is to give a general preference to mortgages in the order of their filing for record.<sup>2</sup>

§ 430. **Rights, etc., of Mortgagor and Mortgagee: Right of Possession.** — *Fourthly*, as to the rights and liabilities of the parties to a chattel mortgage. The general property in the chattels ordinarily passes to the mortgagee under the instrument, and he holds the legal title to them, which, if the writing be duly recorded, no stranger, according to the policy of most States, has the right to disturb. The instrument of mortgage and the uncanceled mortgage note *prima facie* establish his title in the property, even as against the mortgagor himself.<sup>3</sup> He has a right of possession as incidental

must be made out by extrinsic evidence. In both of the classes last named, the jury must determine all the facts. *Campbell, J., in Oliver v. Eaton*, 7 Mich. 112. This whole subject of the validity of chattel mortgages without accompanying possession is somewhat in a state of conflict and uncertainty. But the ordinary doctrine concerning fraudulent transfers of property "made with the intent to hinder, delay, or defraud creditors" bears immediately upon the present question. See, in addition to foregoing cases, *State v. Tasker*, 31 Mo. 445; *Gardner v. McEwen*, 19 N. Y. 123; *Wilhelmi v. Leonard*, 13 Iowa, 330; *Brown v. Webb*, 20 Ohio, 389; *Hickman v. Perrin*, 6 Cold. 135; *Weld v. Cutler*, 2 Gray, 195; *Bank of Leavenworth v. Hunt*, 11 Wall. 301; *Place v. Langworthy*, 13 Wis. 629; *Read v. Wilson*, 22 Ill. 377; *U. S. Dig. Mortgage*, 49, 50; *Suppl. ib.* 424-426. In some States the rule against frauds is apparently more strict than in others, often because of the peculiar wording of the statute. See *Ranlett v. Blodgett*, 17 N. H. 298; *Robinson v. Holt*, 39 N. H. 557; *Steinart v. Deuster*, 23 Wis. 136. Whether a

mortgage of a trader's stock, which permits the mortgagor to sell in the usual course of trade, be essentially fraudulent, is a disputed question which occasions much controversy. See, at length, *Jones Chatt. Mort.* §§ 379-425, and cases cited.

Suffering property covered by a chattel mortgage to remain in the hands of the mortgagor unreasonably long after default is often a circumstance imputing fraud. See *Jones*, §§ 369-378; *Bullock v. Narrott*, 49 Ill. 62. And the circumstance that the mortgagor is left in the possession and use of property which is necessarily consumed in the use is strongly unfavorable to the idea of a *bona fide* transaction as against creditors of the mortgagor. *Robbins v. Parker*, 3 Met. 117; *Jones Bailm.* §§ 367, 368.

<sup>1</sup> *Tiffany v. Warren*, 37 Barb. 571.

<sup>2</sup> See *Jones Chatt. Mort.* § 246. All this is largely a matter of local statute construction. See *De Courcey v. Collins*, 21 N. J. Eq. 357.

<sup>3</sup> See *Conner v. Carpenter*, 28 Vt. 237; *Moore v. Murdock*, 26 Cal. 514; *Fikes v. Manchester*, 43 Ill. 379; *U. S. Dig. Mortgage*, 50; *Suppl. ib.* 425,

to such right of property, which right of property, however, is defeasible upon condition subsequent and not absolute.<sup>1</sup> The title of the mortgagee thus gained is sufficient for maintaining an action at law against all persons not setting up any claim under the right to redeem; and he may sue for the conversion of the goods, although they are not in his actual possession, so long as he has the right of possession therein.<sup>2</sup> The validity of the mortgage is not affected in the least by the fact that he holds other independent collateral security for the debt which his mortgage secures.<sup>3</sup> And a mortgagee's immediate right of possession to the chattels, such as entitles him to sue for them, holds good in general, wherever there is no distinct agreement to the contrary, and even though the mortgage debt be not yet due.<sup>4</sup>

But here, once more, we are confronted with the circumstance that mortgages of chattels often give the mortgagor the right, in express terms, to hold the chattels until maturity of the debt or breach of condition; and when this is the case, and the constructive possession is not in the mortgagee, the latter cannot sue for conversion of the property;<sup>5</sup> nor is the mortgagor's possession under such a provision like that

427; *Jones Chatt. Mort.* § 426, and cases cited. The rule varies somewhat according to local statute provisions concerning title and registry. See *ante*, § 425; *Jones Chatt. Mort.* § 427.

<sup>1</sup> *Jones Chatt. Mort.* § 426; *Coles v. Clark*, 3 Cush. 399; *Hall v. Sampson*, 35 N. Y. 274; *Miller v. Pancoast*, 5 Dutch. 250.

<sup>2</sup> *Hotchkiss v. Hunt*, 49 Me. 213; *Fenn v. Bittleston*, 7 Ex. 152; *Freeman v. Freeman*, 2 C. E. Green, 44; *Harmon v. Short*, 8 S. & M. 433. And where the mortgage is made to several, they may join in such suits. *Wheeler v. Nichols*, 32 Me. 233.

<sup>3</sup> *Ayres v. Wattson*, 57 Penn. St. 360.

<sup>4</sup> See *supra*, § 427; *Brackett v. Bullard*, 12 Met. 308; *Welch v. Sackett*, 12 Wis. 243; *Ferguson v. Clifford*, 37 N. H. 86; *Skiff v. Solace*,

23 Vt. 279; *Landon v. Emmons*, 97 Mass. 37.

<sup>5</sup> See *Curd v. Wunder*, 5 Ohio St. 92; *Goulet v. Asseler*, 22 N. Y. 225. If the parties make an express stipulation in regard to possession before default, that determines their rights. *Jones Chatt. Mort.* § 430; *McGuire v. Benoit*, 33 Md. 181. A mortgagor cannot maintain trespass or trover against a mortgagee rightfully in possession of the property, nor maintain replevin. *Jones Chatt. Mort.* §§ 434, 435, 436; *Holmes v. Bell*, 3 Cush. 322; *Leach v. Kimball*, 34 N. H. 568. Nor can a junior mortgagee. *Ib.*; 4 Litt. 285; *Landon v. Emmons*, 97 Mass. 37. But where the mortgagor has, by express terms of the mortgage or otherwise, the right to remain in possession until default, the mortgagee becomes thus liable if he disturbs such possession. *Jones*, §§ 437,



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of a mere bailee, but he is held to be owner as well as rightful possessor until default.<sup>1</sup> For, to sustain trover or trespass, one must show that he had either the actual possession or the right of the possession at the time of the alleged taking or conversion. The title of a mortgagee of chattels, however, so long as the mortgagor has the right of possession, is of a reversionary nature; and, for damages to this reversionary interest, the mortgagee is permitted to sue to recover damage, according to the recognized practice of some States, although the right to immediate possession be not in him, but in the mortgagor.<sup>2</sup> And courts of equity will interfere, on a bill properly filed for that purpose, to protect a mortgagee of personal as well as of real property against waste or destruction by the mortgagor in possession or the mortgagor's creditors.<sup>3</sup> Legislative policy in a few States distinctly regards the chattel mortgage in the equitable light of a mere security, so that no legal title shall pass to the mortgagee until after foreclosure or something equivalent, and a clear default.<sup>4</sup>

§ 431. **Sale, Transfer, etc., by Mortgagor; Mortgagor's Interest.** — So far is the mortgagee favored where he has the legal title to the chattels and the right of immediate possession, that sales as of the entire property made by the mortgagor, or a subsequent pledge or mortgage, without notice given

442; *Brink v. Feoff*, 44 Mich. 69. Whether the mortgagee can be enjoined from taking possession, see *Cline v. Libby*, 46 Wis. 123.

As against third persons the mortgagor's possession may sometimes be considered the constructive possession of the mortgagee. See *Jones*, § 446; *Jones v. Webster*, 48 Ala. 109; 43 Miss. 456; *Simmons v. Jenkins*, 76 Ill. 479. On the death of the mortgagor, personal estate in his possession passes into the custody of the law for administration. *Kater v. Steinruck*, 40 Penn. St. 501.

A mortgage sometimes expressly provides that the mortgagee may take possession of the mortgaged

goods in case they are removed from the premises; or, more generally, whenever the mortgagee shall deem himself insecure; and such provisions are sustained to the fullest extent by the courts, as neither unconscionable nor hard. *Jones*, §§ 490 a, 431.

<sup>1</sup> *Jones*, § 428; *Fenn v. Bittleston*, 8 E. L. & Eq. 483; *Johnson v. Simpson*, 77 Ind. 412.

<sup>2</sup> *Googins v. Gilmore*, 47 Me. 9; *Manning v. Monaghan*, 23 N. Y. 539.

<sup>3</sup> *Long Dock Co. v. Mallery*, 1 Beasl. 94; *Parsons v. Hughes*, 12 Md. 1; 12 N. J. Eq. 93; *Curd v. Wunder*, 5 Ohio St. 92.

<sup>4</sup> *Jones Bailm.* § 427; *Michigan*, *Minnesota*, *Oregon*, etc.

of the existing incumbrance and with the design of defrauding him of his interest may be repudiated (subject to the usual exceptions), even where innocent participants must suffer loss thereby.<sup>1</sup> But the mortgagor may have rights in the mortgaged property. And if, as against the mortgagee, he has the right to the possession of the property until default or for any definite period,—a right which may be secured to him, as we have seen, by express stipulation,—that interest may be attached and sold on execution, subject to the mortgage.<sup>2</sup> Furthermore, while the mortgagor has no transmissible legal title after a total default, but only an equity of redemption, it is settled that he may before default sell the mortgaged property while in possession, subject in all strictness to the mortgage incumbrance;<sup>3</sup> and in general his right to transfer his own interest to a third person is not impugned.

A mortgagor of chattels, however, has no right to pledge or mortgage the property to another person, or otherwise to create a lien incumbrance upon it, to the extent of prejudicing the mortgagee's rights.<sup>4</sup> As to selling, absolutely and

<sup>1</sup> *Coles v. Clark*, 3 Cush. 399. And as to intermixed goods, see *Jones*, §§ 481-483; *Willard v. Rice*, 11 Met. 493. A sale in exclusion of the mortgagee's rights justifies his action in trover for the property. *Ib.*; *Jones Chatt. Mort.* § 460.

Where the mortgage of a chattel passes only an equitable title to the mortgagee, by reason of the possession of the chattel being at that time in a third person with whom the mortgagor has a suit pending over the title, the benefit of any judgment rendered afterwards in favor of the mortgagor in such suit will pass to the mortgagee likewise. See *Pindell v. Grooms*, 18 B. Monr. 501.

<sup>2</sup> *Saxton v. Williams*, 15 Wis. 292; 28 N. Y. 585; 1 Kern. 501; *Rindskoff v. Lyman*, 16 Iowa, 260; *Curd v. Wunder*, 5 Ohio St. 92; *Hall v. Sampson*, 35 N. Y. 274.

It is held that a mortgagor in possession of mortgaged property which is exempt from execution by law can maintain trespass against an officer who wrongfully levies upon it. *Vaughan v. Thompson*, 17 Ill. 78.

<sup>3</sup> *Cadwell v. Pray*, 41 Mich. 307; *Daly v. Proetz*, 20 Minn. 411; *Jones Chatt. Mort.* § 454.

<sup>4</sup> *Bissell v. Pearce*, 28 N. Y. 252; *Sargent v. Usher*, 55 N. H. 287. As, for instance, where one who has mortgaged animals by a deed to A., duly recorded, tries to give a paramount lien to B. for pasturing them, while the mortgage remains unimpeachable. But a lien given by force of law—as, *e.g.*, that of a bailee hired to repair the thing—may take priority of a chattel mortgage. *Beall v. White*, 94 U. S. 382; *Williams v. Allsup*, 10 C. B. n. s. 417. See *Jones*, §§ 472-480.

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exclusively as his own, mortgaged property to which the mortgagee has the legal title, neither law nor equity will regard the mortgagor as having any such right, and he could hardly attempt to do so without intending to perpetrate a fraud, and becoming guilty of tortious conversion.<sup>1</sup> By the laws of some States, indeed, it is made an indictable offence for the mortgagor to sell the mortgaged chattels, without first obtaining the written consent of the mortgagee.<sup>2</sup> If the mortgagee permitted a sale or junior incumbrance, for some convenient purpose of his own, and with a recognition of his own security, it is of course a different matter.

§ 432. *Mortgagee's Rights and Liabilities.* — The rights of the mortgagee under a chattel mortgage are found to turn usually upon his right of possession to the mortgaged property or a proper registry of his mortgage. But sometimes the controversy arises upon the nature of the property itself, — whether it shall be deemed real or personal, or mixed.<sup>3</sup>

The liabilities of a mortgagee of chattels in possession before default are doubtless those substantially of a pledgee in possession, except so far as the mortgagee shall be deemed an owner rather than a bailee. And if he exceeds the power which the law or his mortgage in terms confers upon him, in dealing with the property, he must make good the loss which would otherwise fall upon the mortgagor, unless the latter ratifies his acts;<sup>4</sup> not, however, in disregard of his own secured claim.

<sup>1</sup> *Chapman v. Hunt*, 2 Beas. 370; *Bellume v. Wallace*, 2 Rich. 80.

<sup>2</sup> *State v. Plaisted*, 43 N. H. 413; *White Mountain Bank v. West*, 46 Me. 15.

But the title may pass, though the consent of the mortgagee be expressed verbally. *Gage v. Whittier*, 17 N. H. 312; *Shearer v. Babson*, 1 Allen, 486. And the later cases appear to favor an inference of authority to sell from the mortgagee, or even a waiver of his lien under dubious circumstances, as in a pledge. At all events the modern judicial disposition is to uphold a transfer by

the mortgagor, who is left in possession as apparent owner, to the extent of an assignment of his own incumbered title. See *Jones Chatt. Mort.* §§ 454–471.

<sup>3</sup> See *Bringholff v. Munzenmaier*, 20 Iowa, 513; *Sheldon v. Edwards*, 35 N. Y. 279; *Perkins v. Swank*, 43 Miss. 349. And as to the removal of tenant's fixtures by a mortgagee, see *London, &c. Co. v. Drake*, 6 C. B. n. s. 798.

<sup>4</sup> *Beckley v. Munson*, 22 Conn. 299. See preceding chapter.

To adjust more completely the clashing interests of mortgagee and

§ 433. **Mortgagee's Assignment of the Mortgage.** — Chattel mortgages are frequently assigned by a mortgagee; and although such property may not be deemed assignable or negotiable at the earlier law, yet a party taking an assignment of such an instrument acquires rights and an interest in the debt secured and the property pledged which the courts both of law and equity recognize. The debt is the principal thing here, and the mortgaged goods the security; and if, as is commonly the case, the debt be expressed by a note, the most natural course would be to deliver the note with suitable indorsement and assign the mortgage. This right of assigning mortgages is to a considerable degree regulated by statute, and the tendency in our country is to assimilate chattel and real-estate mortgages in this respect; requiring assignments to be recorded as well as the original instruments; and giving to the assignee substantially the same interest and rights of action which belonged to the mortgagee himself, while subjecting him to the same liabilities.<sup>1</sup> But although the assignee of a chattel mortgage usually takes subject to all equities between the original parties, he

attaching creditors, legislation interposes in many States. For instance, in Massachusetts there are statutes permitting mortgaged goods to be attached as if unincumbered, provided the attaching creditor pays or tenders to the mortgagee the amount of his incumbrance within ten days after demand. And in making his demand, the mortgagee must state in writing a just and true account of the debt or demand for which the property is liable to him. Mass. Gen. Sts. c. 123, §§ 62, 63. Under this statute many decisions have been made. And see Mass. Pub. Sts. (1882) c. 161, §§ 74, 75; *Gilmore v. Gale*, 33 N. H. 410; 40 N. H. 117. But, if there be no such legislation, an officer cannot levy upon personal property which is mortgaged, whether in possession of the mortgagor or mortgagee, though the mortgage be

not due, unless it contains an express stipulation permitting the mortgagor to retain possession for a definite period; nor even then, if that period has elapsed. *Eggleston v. Mundy*, 4 Mich. 295, and cases cited. This, at least, is the ordinary rule, independently of equitable maxims and statute; and notwithstanding an attachment of the chattels in the mortgagor's possession, the mortgagee retains his usual right of taking possession. *Saxton v. Williams*, 15 Wis. 292; *Cudworth v. Scott*, 41 N. H. 456. See, at length, *Jones Chatt. Mort.* §§ 555-600.

<sup>1</sup> See *Gilchrist v. Patterson*, 18 Ark. 575; *Beach v. Derby*, 19 Ill. 617; *Moody v. Ellerbe*, 4 S. C. 21; *Carpenter v. Cummings*, 40 N. H. 158; *Lewis v. Palmer*, 28 N. Y. 271; *Potter v. Holden*, 31 Conn. 385; *Robinson v. Fitch*, 26 Ohio St. 650.

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may rely upon the record and is protected against latent equities of which he had no notice.<sup>1</sup> Nor are partial assignments, though recorded, to be favored as against subsequent parties who take without actual notice of them.<sup>2</sup> Usually an assignee without notice, actual or constructive, stands upon the same footing as a *bond fide* mortgagee without notice.<sup>3</sup>

§ 434. **Foreclosure and Redemption of Chattel Mortgages; Mortgagee's Common-law Rights on Default.**—*Fifthly*, as to the foreclosure and redemption of chattel mortgages. The rule of the common law is, that a mortgagee of personal property, upon the failure of the mortgagor to perform the condition of his mortgage, acquires an absolute title to the property.<sup>4</sup> And under these circumstances he not only has a right to take possession of the mortgaged property from the mortgagor or any one holding under him, but would peril his own interests as against the mortgagor's creditors, unless

<sup>1</sup> *Barbour v. White*, 37 Ill. 164; *Pierce v. Faunce*, 47 Me. 507; *Mayor v. Soulier*, 48 Mich. 411.

<sup>2</sup> *French v. Haskins*, 9 Gray, 195; 2 Wis. 322; *Jones Chatt. Mort.* § 504.

<sup>3</sup> See *Jones Chatt. Mort.* §§ 501-519, and cases cited. The assignment of the debt secured passes all the mortgagee's equitable interest in the mortgaged property, whether the assignment be before or after forfeiture. *Jones ib.* § 503, and cases cited. No warranty of title is thus implied. 3 Met. 515. An assignment of a mortgage without the debt secured by it is either a nullity or a transfer of the legal title in trust for the benefit of the holder of the debt; but mutual intention is here to be favored. *Jones*, § 505; *Campbell v. Birch*, 60 N. Y. 214; *Polhemus v. Trainer*, 30 Cal. 685. The mortgagee's assignable interest continues so long as he has a subsisting mortgage; and his assignment, while in or out of possession, confers substantially all his interest. *Jones*, §§ 506, 507; 26 Ohio St. 659.

Where the local statute expressly requires chattel mortgages to be filed or recorded, there is no inference that assignments must likewise be recorded. *Jones*, § 518; 12 Abb. (N. Y.) Pr. 97; 2 Allen, 264.

As to a "subsequent purchaser," &c., within the meaning of statutes making void an unrecorded mortgage as against such parties, see *Jones Chatt. Mort.* §§ 484, 485. Under our registry statutes subsequent mortgages of the same personal property may be made, subject to the prior recorded mortgages. As to the rights of subsequent mortgagees, see *Jones Chatt. Mort.* §§ 492-500. Local legislation with reference to chattel mortgages determines largely by express enactment the rights of parties respectively under a chattel mortgage.

<sup>4</sup> *Langdon v. Buel*, 9 Wend. 80; *Winchester v. Ball*, 54 Me. 558; *Brown v. Phillips*, 3 Bush, 656; *Gilchrist v. Patterson*, 18 Ark. 575; *Phillips v. Hawkins*, 1 Branch, 272.

he did so with due diligence; supposing, of course, that he is not in possession already, in which latter case, doubtless, his title would become completely vested.<sup>1</sup> Nor can such creditors attach the mortgaged property in his possession after the time for payment has expired.<sup>2</sup> Where several notes maturing at different dates are secured on the same chattel mortgage, and the condition of the mortgage is broken on default in payment of any one of the notes, the mortgagee may at his option take possession on the first default, if he has not possession already, or may await the maturity of the last note; and the same principle applies to interest instalments.<sup>3</sup> And it is the mortgagor's own loss if he neglect to pay the instalments as they fall due and thus save a forfeiture.<sup>4</sup> But where the debt secured is payable on demand, or in general there is an engagement secured whose breach is not clearly fixed, the mortgagee's rights do not become absolute until demand is made or delinquency becomes clearly fixed; though notice of intention to foreclose would sometimes be regarded as equivalent to a formal demand.<sup>5</sup> And, in general, the mortgagee's title becoming absolute on breach of condition of the mortgage, he has the right not only to possess himself of the chattels given as security, but may sell them afterwards at public or private sale, so as to confer a good title, and may pay his debt out of the proceeds.<sup>6</sup>

All legal claim on the mortgagor's part is gone after forfeiture, and he cannot at law compel the mortgagee

<sup>1</sup> See *Lacey v. Giboney*, 36 Mo. 320; *Mercer v. Tinsley*, 14 B. Monr. 273; *Nichols v. Webster*, 1 Chand. (Wis.) 203; *Wooley v. Fry*, 30 Ill. 158; *McNeal v. Emerson*, 15 Gray, 384; *Jones Chatt. Mort.* § 705. If out of possession, the mortgagee may take peaceable possession on default; but not possession by violence. *Thornton v. Cochran*, 51 Ala. 415; *McClure v. Hill*, 36 Ark. 268. If peaceable possession cannot be obtained on default, he should resort to a suit, and replevin or detinue may be maintained. *Jones*, §§ 705, 706.

<sup>2</sup> *Bacon v. Kimmel*, 14 Mich. 201.

<sup>3</sup> *Barbour v. White*, 37 Ill. 164.

<sup>4</sup> *Spring v. Fisk*, 6 C. E. Green, 175. But as to whether, upon a default upon one instalment, the mortgagee can sell the entire property, there is some conflict of opinion. *Jones*, §§ 767-769, and cases cited; 109 Mass. 597; 40 Mich. 610.

<sup>5</sup> *Ely v. Carnley*, 19 N. Y. 496; *Goodrich v. Willard*, 2 Gray, 203; *Jones Chatt. Mort.* § 703.

<sup>6</sup> See *Story Eq. Jur.* § 1031; *Chapman v. Hunt*, 2 Beas. 370.

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to receive payment and restore the property.<sup>1</sup> Nor is the mortgagee bound, upon taking possession for condition broken, to make a sale.<sup>2</sup>

§ 435. **Modern Rule favors Mortgagor more liberally; Equitable Doctrine as to Default.** — But it is to be borne in mind that, regarding this transaction justly, the fundamental object of the mortgage is practically to secure payment of the debt or fulfilment of the obligation; not to forfeit chattels absolutely on breach of condition, without any regard to their value. And as the topic of chattel mortgages has grown and expanded in modern times, so likewise has the disposition increased, on the part of local courts and local legislatures, in conformity with equity maxims, to recognize in the mortgagor an equitable right or interest of which he may avail himself by paying what he owes and redeeming the property. And when the mortgagee sells the mortgaged chattels (which he may do without a formal foreclosure), he ought to do it by a fair public sale and after due notice to the mortgagor; and equity will require the creditor to deal justly with the property both as to the time of the notice and the manner of the sale.<sup>3</sup> And the mortgagor may assert his rights in this respect by a bill in equity, if he commences his suit in a reasonable time;<sup>4</sup> though it is only by way of such interference that the mortgagee's legal title becomes disturbed. Such has long been the rule of equity courts with reference to real-estate mortgages; nevertheless, as to chattel mortgages, these principles are more rarely asserted; so that a legal though defeasible title in the mortgagee before default, and forfeiture of the mortgagor's title at once upon default, appears still the readier result where a chattel mortgage is given.<sup>5</sup>

<sup>1</sup> Wood v. Dudley, 8 Vt. 430; Wilson v. Brannan, 27 Cal. 259, and cases cited; Charter v. Stevens, 3 Denio, 33; Jones Chatt. Mort. § 699.

<sup>2</sup> Nichols v. Webster, 1 Chand. 203; Bradley v. Redmond, 42 Iowa, 152.

<sup>4</sup> Ib. And see as to pledges, *supra*, § 407.

<sup>5</sup> Mr. Jones observes that while in nearly half the States a mortgage of

§ 436. **Mortgagee may foreclose in Equity.**—Thus are we brought to another remedy, which a mortgagee may pursue at his election ; namely, to bring a bill of foreclosure, somewhat as in the case of a real-estate mortgage. And this is his prudent and the ordinary course where the mortgage transaction involves property of considerable value and there are other incumbrances, and parties are interested whose rights cannot readily be ascertained and adjusted.<sup>1</sup> The mortgagee of personal property has an equitable lien for the payment of his mortgage debt on the proceeds of its sale by an assignee of the mortgagor for the benefit of creditors.<sup>2</sup> And until a judicial sale can be properly effected, equity is ready to protect the chattels against conversion or destruction.<sup>3</sup>

§ 437. **Modern Statutes regulating Foreclosure and Redemption ; Special Agreements of Parties, etc.**—Furthermore, the foreclosure and redemption of chattel mortgages are at the present day considerably regulated by local statutes. And these statutes partake frequently of both equity and common-law principals. Thus, in some States a definite period is allowed after breach of condition for the mortgagor to redeem,—say, sixty days ; and the mortgagee's title becomes absolute if the debt is not paid by the time this period has expired.<sup>4</sup> Provisions abound, however, requiring a mortgagee's sale after notice, and the payment to the mortgagor of any surplus which may remain after satisfying the mortgage debt.<sup>5</sup>

real estate has come to be regarded as merely a lien and not a conveyance of the legal title, a chattel mortgage is still regarded as a transfer of the title, and not a mere lien, to a greater extent. Jones Chatt. Mort. § 699, and cases cited.

No provision in the mortgage in regard to a sale or payment of the surplus to the mortgagor prevents the title from becoming absolute upon default without a sale. Jones, § 700 ; 2 Denio, 170 ; 69 Ill. 371. But the rule is differently stated in some States. 34 Mich. 360.

<sup>1</sup> See *Bryan v. Robert*, 1 Strobb. Eq. 334 ; *Dupuy v. Gibson*, 36 Ill. 197 ; *Blakemore v. Taber*, 22 Ind. 466 ; *Freeman v. Freeman*, 2 C. E. Green, 44 ; *Briggs v. Oliver*, 68 N. Y. 336 ; Jones, §§ 776-788.

<sup>2</sup> *Wilson v. Gray*, 2 Stockt. 323.

<sup>3</sup> *Freeman v. Freeman*, 2 C. E. Green, 44.

<sup>4</sup> *Winchester v. Ball*, 54 Me. 558. See *Daniels v. Henderson*, 5 Fla. 452.

<sup>5</sup> In some States the same statute applies to the foreclosure of both real estate and chattel mortgages. These



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Foreclosure notices, and the registry of certificates too, are sometimes made matters of legislation.<sup>1</sup>

Even the mutual contract of the parties may largely determine their respective rights; for, as in real-estate mortgages, it has now become quite customary to insert in the mortgage instrument a power of sale clause, conferring upon the mortgagee the right to a summary sale after giving a prescribed notice. These powers of sale are jealously scrutinized by courts of equity; and yet on the whole they appear to be favorably upheld;<sup>2</sup> as they certainly are in the case of a

statutes are by no means uniform in their provisions; but the legislative disposition appears to be to require a sale on default somewhat after the manner observed in pledges. Very little provision is made in these statutes for the redemption of chattel mortgages; that being left rather to equity administration, and the right existing until the statute foreclosure becomes complete. See *Jones Chatt. Mort. c. 17*, where these statutes are noted at length.

Any income derived by the mortgagee from the beneficial use of the mortgaged property ought usually to go to the mortgagor, or towards the extinction of the debt, at least; and though a mortgagee in possession may not be sued at law by the mortgagor for the income he receives from the property, yet the latter is entitled to a fair allowance in this respect with any surplus proceeds which remain over from a sale. *Osgood v. Pollard*, 17 N. H. 271.

<sup>1</sup> *Taber v. Hamlin*, 97 Mass. 489; *Hatch v. Bates*, 54 Me. 136.

<sup>2</sup> See *Ashton v. Corrigan*, L. R. 13 Eq. 76; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Walker v. Stone*, 20 Md. 195; *Brightly v. Norton*, 3 B. & S. 305; *Williams v. Hatch*, 38 Ala. 338; *Thurber v. Jewett*, 3 Mich. 295; *Jones Chatt. Mort. §§ 789-821*. And the mortgagee, under a power of sale, has reasonable discretion as to

adjournment of the sale. *Hosmer v. Sargent*, 8 Allen, 97.

It would appear that in most parts of this country the mortgagee of a chattel is permitted to purchase it at a sale made under the mortgage, provided the sale be fairly conducted and he act honorably; and, indeed, the tendency is to insert some such permission as this in power-of-sale mortgages, even where the legislature has not already granted it. The purchase would be good at common law, and equity is not likely to interfere with it save on the application of parties interested and when the mortgagee appears to have abused his opportunities. See *Bean v. Barney*, 10 Iowa, 498; *Lyon v. Jones*, 6 Humph. 533; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Wright v. Ross*, 36 Cal. 414. But see *Korns v. Shaffer*, 27 Md. 88; *Pettibone v. Perkins*, 6 Wis. 616; *Imboden v. Hunter*, 23 Ark. 622. And see *Jones*, §§ 806-810. And whether the mortgaged property be sold with the consent of the mortgagor, or by way of foreclosure, a mortgagee has the right, unless he has clearly stipulated to the contrary, to apply the proceeds to the payment and satisfaction of the mortgage debt; or, if that debt is payable by instalments, towards the payment of any instalments which may be due, at his option. *Masten v. Cummings*, 24 Wis. 623; *Saunders*

pledge;<sup>1</sup> nor is it to be presumed that statute directions regarding the mode of sale exclude the mortgage parties from agreeing that sale upon default shall be after some different method.<sup>2</sup> An irregular foreclosure sale may operate as an assignment of the mortgage; and at all events the lien of an unpaid mortgage debt remains.<sup>3</sup>

§ 438. **Mortgagee may pursue Personal Remedies against Mortgagor on Default.**—As with respect to a pledge, so our present secured creditor may waive or postpone his claim under the mortgage security, and pursue his personal remedies against the mortgagor. His attachment of the mortgage property or of other property in a personal suit to recover his debt is no violation of the mortgagor's rights.<sup>4</sup> He has, moreover, the same right that a mortgagee of real property has to pursue all his remedies concurrently; suing on the mortgage note and carrying on proceedings at the same time for foreclosure.<sup>5</sup> Holding various securities he may avail himself of any or all of them at discretion; deriving, however, but one satisfaction,<sup>6</sup> and permitting the subrogation of securities for purposes of contribution.

§ 439. **Mortgagor's Equity of Redemption.**—We have already alluded to the mortgagor's equity of redemption; a right which is regarded with increased favor in these days, as constituting his real and beneficial interest in the mort-

v. McCarthy, 8 Allen, 42. See *White Mountain Bank v. West*, 46 Me. 15; *Locke v. Palmer*, 26 Ala. 312. And see *Long v. Long*, 1 C. E. Green, 69, as to a bond secured by mortgage.

<sup>1</sup> §§ 407, 408.

<sup>2</sup> *Jones Chatt. Mort.* §§ 778, 789; *Denny v. Van Dusen*, 27 Kans. 437. Parties may agree expressly that the mortgagee may sell on default at private sale. *Reynolds v. Smith*, 28 Kans. 810; 60 Barb. 425. As to permitting a sale without notice, the question of fairness is open to proof. *Wylder v. Crane*, 53 Ill. 490. Power of sale does not imply power to barter or exchange the property. *Edwards v. Cottrell*, 43 Iowa, 194. In general

the sale under a power must be fair and *bona fide* in order to extinguish the equity of redemption. See *Jones*, §§ 801-805. Contract may empower to sell before default. 101 Mich. 590.

<sup>3</sup> *Jones*, § 811; *Rose v. Page*, 82 Mich. 105; 43 Neb. 224.

<sup>4</sup> *Buck v. Ingersoll*, 11 Met. 226; *Whitney v. Farrar*, 51 Me. 418; *Taylor v. Cheever*, 6 Gray, 146. Though probably attachment of the mortgaged property abandons one's attitude as mortgagee.

<sup>5</sup> *Juchter v. Boehm*, 63 Ga. 1; *Pettibone v. Stevens*, 15 Conn. 19; *Jones Chatt. Mort.* § 758.

<sup>6</sup> *Ayres v. Wattson*, 57 Penn. St. 360; *Chapman v. Clough*, 6 Vt. 123.

gaged property. The worth of the equity of redemption in mortgaged chattels is substantially the value of those chattels over and above the liability which they are designed to secure. If the mortgagee of personal property retains the property after breach of condition, as we have seen he may, without selling, though he have the legal title in the chattels, yet are they always liable to redemption in equity, at the mortgagor's instance, subject of course to lapse of time and *laches* on his part; and the debt being satisfied, the mortgagee would have no right to retain them longer.<sup>1</sup> And if the mortgagee sells the property, the mortgagor is allowed to redeem after the day of forfeiture at any time before foreclosure is completed by equity proceedings or by such sale upon due notice or by some other mode which complies with statute or a just understanding of the parties.<sup>2</sup> The surplus proceeds, after satisfaction of the mortgage debt and incidental expenses, ought, after a sale of the property, to be paid over by the mortgagee to the mortgagor.<sup>3</sup> Equity courts are always suspicious of arrangements by means of

<sup>1</sup> *Freeman v. Freeman*, 2 C. E. Green, 44; *Story Eq. Jur.* § 1031; *Doane v. Garretson*, 24 Iowa, 351. See, also, *supra*, p. 534.

<sup>2</sup> *Ib.* It is even held that a mortgagor of chattels in possession has a right to renew his interest in them after breach of the condition of the first mortgage, but before a sale. *Smith v. Coolbaugh*, 21 Wis. 427. And see *Carty v. Fenstermaker*, 14 Ohio St. 457.

It is held that a mortgagee may, in absence of statutory requirement or express agreement to the contrary, cut off the right of redemption by a sale upon reasonable notice to the mortgagor. *Jones*, § 707, and cases cited. This doctrine is upheld in New York, and New Jersey, and other States. In the case of a pledge a similar right exists. *Supra*, § 407. But this statement of the law does not apply to the practice in various States, where the mortgage itself

makes no such provision. *Jones*, *ib.*; *Flanders v. Chamberlain*, 24 Mich. 305.

A sale of the mortgaged property upon a foreclosure by consent of the parties excludes the equity of redemption and confirms the title of the *bona fide* purchaser. 39 Barb. 390. But an irregular foreclosure sale operates substantially as an assignment of the mortgage. *Walker v. Stone*, 20 Md. 195.

<sup>3</sup> *Parish v. Wheeler*, 22 N. Y. 494. And see *Flanders v. Thomas*, 12 Wis. 410; *U. S. Dig. Mortgage*, 50; *Suppl. ib.* 425; *Alger v. Farley*, 19 Iowa, 518. Nor can a creditor, who has sold chattels under a mortgage from a corporation, excuse himself from crediting the proceeds on the ground that the transaction which furnished the consideration of the mortgage was *ultra vires* on the part of the corporation. *Ib.*

which the mortgagee pretends to buy in his mortgagor's right of redemption; for in preserving this right lies the debtor's last hope, and, the equity finally extinguished, his interest in the property is gone completely. Any sale of the property by a mortgagee before the time of breach and foreclosure would ordinarily be a conversion and render him liable to the mortgagor's suit.<sup>1</sup>

§ 440. **Payment, Satisfaction, etc., of Mortgage Debt.**— But a mortgage debt, like any other debt, may be extinguished, as by release or payment and satisfaction; and generally whatever extinguishes a mortgage debt extinguishes the mortgage security also. But the extinguishment of a mortgage debt involves questions concerning the intent of parties.<sup>2</sup> The payment of the mortgage debt to a mortgagee, by some third party who is under no obligation to make it, will not necessarily operate in satisfaction of it; the intention of this third party in making the payment being regarded.<sup>3</sup> In these and many other respects, the doctrines applicable to debts in general will be found to apply.<sup>4</sup>

§ 441. **Mortgage of a Ship or Vessel.**— Before we leave the general subject of chattel mortgages, it may be well to speak briefly concerning the mortgage and hypothecation of ships and vessels. These are sometimes mortgaged like other personal property; in which case they appear to come under the usual rules concerning registry, save so far as statutes of any State, in this respect, may be thought to interfere with those of the United States; the navigation

<sup>1</sup> Spaulding v. Barnes, 4 Gray, 330.

<sup>2</sup> See Harrington v. Brittan, 23 Wis. 541; Bryant v. Pollard, 10 Allen, 81; Packard v. Kingman, 11 Iowa, 219; Franklin Bank v. Pratt, 31 Me. 501; Jones Chatt. Mort. §§ 632-680.

<sup>3</sup> Walker v. Stone, 20 Md. 195.

<sup>4</sup> See, further, chapter as to Debts, *supra*; Thompson v. Van Vechten, 27 N. Y. 568; Packard v. Kingman, 11 Iowa, 219; 3 Kern. 556; Jones Chatt. Mort. §§ 632-657. For the doctrines of merger and subrogation here applicable, see Jones Chatt.

Mort. §§ 658, 659. If the Statute of Limitations runs long enough to bar a debt secured by a mortgage, the mortgagee's title is not thereby defeated. Crain v. Paine, 4 Cush. 483; Almy v. Wilbur, 2 W. & M. 371. Statutes requiring a formal instrument for discharge of a mortgage and its record should be carefully followed; yet it will be found that requirements of this sort are quite lax for chattel as compared with real-estate mortgages. See Jones Chatt. Mort. §§ 663-680.

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laws of this country being shaped and controlled more immediately by the federal than any local government.<sup>1</sup>

§ 442. *Hypothecation of a Ship; Bottomry and Respondentia Bonds.* — But loans on the security of ships and vessels are most commonly effected by means of a *bottomry* bond, and instead of pledging or mortgaging the vessel we hear of its *hypothecation*. These terms are derived from the civil rather than the common law; and the contract of bottomry is so called because the keel or bottom of the ship is made the security.<sup>2</sup>

Similar to bottomry bonds are *respondentia* bonds, and a

<sup>1</sup> See 1 Pars. Shipping, 60-63; *Mattingly v. Darwin*, 23 Ill. 618; *Veazie v. Somerby*, 5 Allen, 280; *Wood v. Stockwell*, 55 Me. 76; *Clark v. Wilson*, 103 Mass. 219; *The Troubadour*, L. R. 1 Ad. & Ecc. 302; *supra*, §§ 307, 316, 317; *Jones Chatt. Mort.* §§ 520-554; *Provost v. Wilcox*, 17 Ohio, 359; *Ætna Ins. Co. v. Aldrich*, 26 N. Y. 92. Capture of a vessel as prize overrides a mortgage. *The Hampton*, 5 Wall. 372.

<sup>2</sup> "To hypothecate" is much the same as "to mortgage," if the terms of the civil law are convertible at all; and certainly it is quite different from pledging a thing; for with the Roman *pignus* and the English pledge, the possession of the thing passes to the pledgee, while in a case of hypothecation it may remain in the owner's possession. 1 Pars. Shipping, 132; *Just. Inst. lib. 4, tit. 6, § 7*; *Domat Civil Law*, § 1657; *The Atlas*, 2 Hagg. Adm. 48, 53. The questions arising under the hypothecation of vessels by bottomry are determined for the most part in the courts of admiralty; and while it is a matter of doubt whether such courts can take jurisdiction in case a bottomry bond is made by the owner in a home port, this kind of security is most frequently given by the master abroad in cases of necessity, and here the admiralty jurisdiction is ample and exclusive. Abb.

Shipping, 153; 1 Pars. Shipping, 133, and conflicting cases cited; *Bouv. Dict. "Bottomry"*; *Blaine v. The Carter*, 4 Cr. 328; 2 Ld. Raym. 982. This sort of hypothecation is by a bottomry bond, the contract itself being commonly termed "bottomry;" and by such a contract the owner of the ship, or the master as his agent, borrows money for the use of the ship, and gives as security a sort of mortgage upon the ship for a specified voyage. The essentials of a bottomry bond are, that it shall bind the ship for the payment of the money, provided the ship perform the voyage and arrive in safety; while, if the ship is lost, no part of the loan is to be paid, and the lender loses his money. Here, it is evident, the lender takes a risk similar to that borne by insurers; and for this reason he is allowed to stipulate for maritime or extraordinary interest by way of compensation, without falling under the bar of the usury laws. 1 Pars. Shipping, 134, and cases cited; *Bright. Fed. Dig. Shipping*, 793, 794; *The Atlas*, 2 Hagg. Adm. 48, 57. Mr. Parsons thinks that there seems no good reason why a bottomry bond may not provide for common interest, and for payment by the owner of the money borrowed, whether the ship be safe or lost. See 1 Pars. 135.

loan is of the latter description where the security is not the ship, but the goods laden on board in whole or in part. Here it is said that the borrower's personal *responsibility* is deemed the principal security for the performance of the contract, and hence the origin of the term.<sup>1</sup>

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## CHAPTER VII.

### BILLS AND NOTES.

§ 448. **History of Bills and Notes.** — Bills of exchange are supposed to have first come into use with the revival of commerce in the Mediterranean Sea about the thirteenth century, and promissory notes considerably later: though some of the legal principles applicable to both classes of instruments were foreshadowed in the Roman civil law. They are often placed together under the general heading of "negotiable paper;" and how advantageous it was to merchants in the earlier days of the English common law to have at least one kind of incorporeal personal property with the characteristic quality of negotiability, and so as to transfer the money right itself from one to another, we have already shown.<sup>2</sup> The doctrine of assignment as applied to chattels has changed wonderfully since the day when a common usage among British merchants found its first regular sanction in the legislation of Queen Anne's reign; yet negotiable paper is still found of the greatest convenience in

<sup>1</sup> 1 Pars. Shipping, 165-167; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; *Franklin Ins. Co. v. Lord*, 4 Mass. 248.

The whole subject of chattel mortgages is at the present day changed and regulated by local statutes both in Great Britain and the United States; and the practitioner should rely mainly upon the judicial precedents and legislation of his own jurisdiction, general rules being now of

comparatively little moment. When the first edition of this work was published, no trustworthy text-book upon chattel mortgages could be found by the author. He now takes pleasure in recommending the treatise of Mr. Leonard A. Jones upon that subject, which was published in 1881.

<sup>2</sup> *Supra*, § 83. And see 1 Pars. Notes and Bills, c. 1; Story Bills, §§ 6-11; 3 Kent Com. 71-74.

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trade and commerce, furnishing a clear test of the mercantile standing of individuals and firms, and enabling any business man to secure a concise written acknowledgment of an outstanding debt due him, which may be placed on the money market and realized at its current value from any purchaser.

"Bills of exchange" are, however, to be distinguished from "promissory notes." Instruments of the former class are found of peculiar importance (though not exclusively so used) in foreign or inter-State transactions;<sup>1</sup> or at least among business men who carry on commerce abroad, or otherwise deal from a distance, if not between different countries. But those of the latter class are available rather when the dealings are inland and in the same neighborhood. A promissory note in its simplest form is only a written *promise* to pay money, but a bill of exchange is a written *order* for the payment of money; one's own credit being the primary fund in the one instance, and a special credit or fund in another and perhaps some distant but accessible person's keeping being the original source of reliance in the other. And while but two parties—the debtor and creditor—are essential to a promissory note, at least three—the debtor, the creditor, and the accessible fund-holder of the debtor—are necessary where the negotiable instrument is bill of exchange.<sup>2</sup>

§ 444. **Bills of Exchange and Promissory Notes Defined.**—But to be more precise in our definitions. A *bill of exchange* is a written order from one person to another, directing the person to whom it is addressed to pay to a third person a certain sum of money therein named.<sup>3</sup> Bills of exchange

<sup>1</sup> A draft drawn in Ohio upon a bank in New York and payable in New York is in effect a foreign bill of exchange. *Armstrong v. Am. Exch. Bank*, 133 U. S. 433.

<sup>2</sup> If a bill be drawn and accepted by the same party it may be declared on as a promissory note. *Willans v. Ayres*, 3 App. Cas. 133.

<sup>3</sup> *Byles Bills*, 1; 3 *Kent Com.* 74; 1 *Para. Notes and Bills*, 52. To bor-

row the familiar illustration: if A., living in New York, wishes to receive one thousand dollars, which await his orders in the hands of B., in London, he applies to C., going from New York to London, to pay him one thousand dollars, and take his draft on B. for that sum, payable at sight. This is an accommodation to all parties. A. receives his debt for transferring it to C., who carries his

may be inland or foreign: they are inland when both drawn and made payable within one's own country; but when either drawn or made payable in another country, they are foreign. This distinction becomes important when questions arise on suit, and especially those which concern the protest and damages for non-payment; and it has been usual to draw foreign bills in sets of three, that duplicates may be at hand if the first be lost or destroyed; while of inland bills, signed copies are seldom, if ever, furnished.<sup>1</sup> A *promissory note*, which is a simpler sort of instrument, may be defined as a written promise to pay a certain sum of money at a certain specified date or on demand.<sup>2</sup>

§ 445. **Leading Essentials of Bills and Notes.**—The essentials of notes and bills are frequently made the subject of legal discussion. And while it is impossible for us to pursue minutely, in our present brief investigation, the long array of cases, often conflicting, upon this or any other topic relative to negotiable paper, some of these leading essentials may be pointed out in passing. All instruments of this kind are expressed in writing; for nothing oral can here serve mercantile convenience.

Substance, rather than form of expression, is the leading

money across the Atlantic, in the shape of a bill of exchange, without any danger or risk in the transportation; and on his arrival at London he presents the bill to B., and is paid. 3 Kent Com. 74.

<sup>1</sup> 1 Pars. Notes and Bills, 55-60; Downes v. Church, 13 Pet. 205; Byles Bills, 311; Mahony v. Ashlin, 2 B. & Ad. 478. And to recur to our illustration; A., who draws the bill, is called the *drawer*; B., to whom it is addressed, is called the *drawee*; and C., to whom the bill is made payable, is called the *payee*. But B., on accepting the bill, takes still another relation, that of *acceptor*; while C., under some circumstances to be presently noticed, in passing the instrument over that a fourth party may receive payment instead

of himself, assumes the new relation of *indorser*.

<sup>2</sup> A common form, in use with us, is this: "New York, January 1, 1871. I promise to pay A. B., or order, one thousand dollars in three months. Value received. C. D." But no special form is necessary; and slight variations are to be found, both in collocation of words and the general language. Byles Bills, 1; 3 Kent Com. 75; 1 Pars. Notes and Bills, c. 2. The person who makes the promise, C. D., is called the *maker*, and he to whom the promise is made, A. B., is the *payee*. And here, again, as in the case of a bill of exchange, the payee, under similar circumstances of transfer to enable another party to receive payment, assumes the new relation of *indorser*.



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regard in such instruments. Thus for "promise to pay," an equivalent expression may be substituted; though an "I. O. U.," or mere acknowledgment of a debt, without an accompanying promise is declared in England and many parts of this country not to be negotiable paper,<sup>1</sup> inasmuch as there should be some sort of promise to pay, as the style "promissory note" indicates. Certainty is a prerequisite of such instruments; certainty as to the payee, certainty as to the party who makes himself liable for payment, certainty as to the amount to be paid in lawful money, certainty as to the time of payment, and certainty as to the fact of payment; with this qualification, that what can be construed into certainty is itself certain.

Certainty as to the payee implies that one should be designated, either by name or as bearer. A note or bill payable to the order of "the administrators" (already appointed) "of A." is sufficiently certain, for evidence from without will establish it; but not an instrument to persons in the alternative, or "to the secretary for the time being" of a society; for here there is a contingency as to the person entitled to payment.<sup>2</sup> Negotiability as between the original parties is not essential to a note or bill: yet the usual course is to make the instrument out payable to "A., or order," in which case it is fully negotiable upon A.'s indorsement; or else to make it payable to "A., or bearer," and thus have it fully negotiable at the outset. Even a fictitious payee's name is in the latter instance sometimes inserted, or more generally the payee's name is left blank, the maker thereby authorizing any *bonâ fide* holder to insert his own name.<sup>3</sup> Certainty as

<sup>1</sup> See 1 Pars. Notes and Bills, 23-26, and cases cited; Tomkins v. Ashby, 6 B. & C. 541; Byles Bills, 6th ed. 10. Not an invariable rule, it seems, in the United States. See also Huyck v. Meador, 24 Ark. 191; Johnson v. Frisbie, 15 Mich. 286; Hussey v. Winslow, 59 Me. 170; Currier v. Lockwood, 40 Conn. 349; Big. 2d ed. 22; 2 R. I. 319.

<sup>2</sup> Cf. Musselman v. Oakes, 19 Ill.

81; Storm v. Stirling, 3 Ell. & B. 832; 16 Ill. 169; 1 Pars. Notes and Bills, 30-35; Osgood v. Pearsons, 4 Gray, 455. But see Holmes v. Jacques, L. R. 1 Q. B. 376, showing that there may be an alternative expression as to A. and one who is A.'s agent.

<sup>3</sup> 1 Pars. ib.; Crutchly v. Mann, 5 Taunt. 529; 3 T. R. 581; Middlesex, &c. v. Davis, 3 Met. 133; Redf. & Big. Bills and Notes, 6. A bill of

to the party who makes himself liable for payment implies not only that the order and conditions of liability should be clear, but that the promising party should put his name to the instrument in such a way as to manifest his intention to assume the liability.<sup>1</sup> Certainty as to amount is a requisite strictly enforced; and while a particular fund might sometimes be mentioned in the instrument, or the payment might be directed in gold coin instead of paper currency: or, in other words, in one kind of lawful money rather than another; while, too, payment with interest added or (in bills of exchange) with exchange is undoubtedly proper; yet, as a rule, the principal sum payable must be stated definitely, and must be in lawful money, and must not be connected with any indefinite or uncertain stipulations.<sup>2</sup>

§ 446. **The Same Subject.**—Certainty as to time of payment is construed more liberally, but yet with precision; thus, a promise to pay when C. shall arrive at age vitiates an instrument as a note or bill with its peculiar incidental advantages, for C. may die a minor. But the date need not be written in a note, nor is a note vitiated by being dated forward or antedated, for the true date may be supplied. When no time of payment is mentioned, the presumption is

exchange accepted on good consideration, but with the drawer's name left blank, may be completed in chancery after the acceptor's death. 20 Ch. D. 225.

<sup>1</sup> The signature may be by agent; and if the suitable intention clearly enough appear, the promisor's own name signed in any part of the paper, or even his initials, will make the note complete and binding; though he would be foolish not to put his signature at the foot of the promise, where it belongs, and write it out with reasonable fulness. 1 Pars. 35-37. See *Sanders v. Anderson*, 21 Mo. 402; *Merchants' Bank v. Spicer*, 6 Wend. 443; *Ferris v. Bond*, 4 B. & Ald. 679. Whether equity may supply an omission to sign, through mistake, see 100 Mass. 18; 35 Mich. 50.

<sup>2</sup> See *Dewing v. Sears*, 11 Wall. 379; 1 Pars. Notes and Bills, 37, 38, 45-47; Redf. & Big. 1-6; *Kelley v. Brooklyn*, 4 Hill, 263; *Thompson v. Sloan*, 23 Wend. 71; *Shamokin Bank v. Street*, 16 Ohio St. 1; *Cook v. Satterlee*, 6 Cowen, 108. An instrument may be payable in currency or funds which are shown to circulate as money. *American Emigrant Co. v. Clark*, 47 Iowa, 671. There are other American cases which treat a note as good, for some purposes at least, though not expressed as payable in what would be called "money;" as, *e.g.*, in State bank-notes, or in "Canada currency," or even in specific articles. See Big. 2d ed. 14; 15 Ohio, 118; 17 Vt. 549; *Black v. Ward*, 27 Mich. 191.

that the note or bill is payable on demand ; and where a note is payable on demand, it is clear that (subject to statutes of limitation) the note is due when the demand is made, though the original parties may have no idea when that time will come.<sup>1</sup> Certainty as to the fact of payment implies that there should be nothing contingent or conditional in the promise to pay. Where, instead of a mere reference to some fund, the writing directs payment out of that fund only ; or where the payment depends upon the performance of some corresponding obligation ; or where it is contingent upon expectations which may not be realized ; in these and similar instances the instrument is not a negotiable note or bill, however valuable in the light of an assignment. But it is no objection to a note or bill that it states the transaction out of which it arose, the consideration for which it was given, or by way of memorandum that other property is deposited as collateral security;<sup>2</sup> nor even that it states a liability to

<sup>1</sup> *Kelley v. Hemmingway*, 13 Ill. 604 ; Redf. & Big. 11-14 ; 1 Pars. 38-42 ; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11 ; *Pasmore v. North*, 13 East, 517. See *Sayre v. Wheeler*, 31 Iowa, 112.

As to bills, &c., payable at sight, there should be presentment within a reasonable time. *Mullman v. D'Eguino*, 2 H. Bl. 565 ; Big. Bills and Notes, 2d ed. 244.

<sup>2</sup> 1 Pars. Notes and Bills, 42-47, and numerous cases cited ; ib. 60-65 ; Redf. & Big. Bills and Notes, 8-10 ; *Cook v. Satterlee*, 6 Cow. 108 ; *Goshen v. Hurtin*, 9 Johns. 217 ; *Cota v. Buck*, 7 Met. 588 ; 1 Burr. 323 ; *Guyman v. Burlingame*, 36 Ill. 201 ; *Ehries v. De Mill*, 75 N. Y. 370 ; 25 Minn. 530 ; 53 Wis. 537 ; *Worden v. Dodge*, 4 Denio, 159 ; *Collins v. Bradbury*, 64 Me. 37. See *Griffin v. Weatherby*, L. R. 3 Q. B. 753. An order, draft, or check must be drawn upon a particular fund in order to constitute an equitable assignment thereof. *Attorney-General v. Conti-*

*mental Life Ins. Co.*, 71 N. Y. 325. See further Big. 2d ed. 20.

Negotiability is not essential to constitute an instrument a bill of exchange or promissory note ; though one hinders thus a very convenient quality of such instruments. Big. Bills and Notes, 2d ed. 12 ; *Arnold v. Sprague*, 34 Vt. 402 ; 2 Ld. Raym. 1545 ; *Corbett v. Clark*, 45 Wis. 403. If the instrument be payable to order, indorsement makes the negotiability effective ; if payable to bearer generally, the title will pass by delivery. *Supra*, § 84. And hence any such instrument may be restricted in its practical circulation. As to the effect of making an instrument payable "before" a certain date, cf. *Stults v. Silva*, 119 Mass. 137 ; *Helmer v. Krolick*, 36 Mich. 371. An important word, such as "dollars," may sometimes be supplied by parol, if accidentally omitted. *Beardsley v. Hill*, 61 Ill. 354.

The mere fact that the seal of a corporation is added does not make

become due before its date if others of the same series are defaulted.<sup>1</sup>

We may add, on the point of essentials, that, as a rule, whenever it is doubtful upon the face of an instrument whether it was intended as a bill of exchange or a promissory note, and it possesses the requisites of each, the holder may choose to treat it as one or the other.<sup>2</sup>

§ 447. **Principal Parties, etc., compared in Bills and Notes.** — The maker of a note and the acceptor of a bill have nearly the same rights and duties; both of these being the principal parties, to be called on for payment before any other parties are liable. And so, too, the drawer of a bill corresponds mainly, in this relation, to the first indorser of a note. Let us, then, see what is *acceptance*; and, somewhat later, what is *indorsement*.

§ 448. **Acceptance of a Bill of Exchange.** — Acceptance is the engagement to comply with the order contained in a bill of exchange. Acceptance may be constituted in a variety of ways. The usual method is for the drawee of a bill to write across the face, perhaps in red ink, the word "Accepted," and then sign his name. But the law merchant requires less formality, as by mere signature for instance, — regarding evidently actual intent, in such cases, as of far more importance than the method of expressing that intent; and so lax is it, indeed, that local statutes are sometimes brought in to stiffen

the note the contract of the corporation. *Dutton v. Marsh*, L. R. 6 Q. B. 361. As to the effect of describing as agents, trustees, etc., in a signature, and whether one is bound thus personally, see *ib.*; *Story Agency*, §§ 266, 267; *Big*, 2d ed. 46, 47; *Shoe & Leather Bank v. Dix*, 123 Mass. 148; *Gray v. Raper*, L. R. 1 C. P. 604; *Haile v. Pierce*, 32 Md. 327. And as to corporate officers see *Falk v. Moebs*, 127 U. S. 597. Paper given under seal is (independently of statute) a bond or specialty debt, and not a bill or note. This strict rule is sometimes affected by legislation.

*Laidley v. Bright*, 17 W. Va. 779; 85 N. C. 166. See next chapter.

A written statement on the note that it is given as "collateral" would, according to many authorities, restrict its negotiability; though there is a conflict on this point. *Jury v. Barker*, E. B. & E. 459; 1 M. & W. 232; *Treat v. Cooper*, 22 Me. 203; 5 Duer, 207; *Costello v. Crowell*, 127 Mass. 293.

<sup>1</sup> *Chicago R. v. Merchants' Bank*, 136 U. S. 268.

<sup>2</sup> See *Edis v. Bury*, 6 B. & C. 435; 1 Pars. 63; *Guyman v. Burlingame*, 36 Ill. 201; *Willans v. Ayers*, 3 App. Cas. 133.

the requirements. A written and signed acceptance is sometimes made essential, then, by legislation ; but in the absence of legislation even a verbal acceptance is valid, if communicated to the party who takes the bill, and if he takes it on the credit of that acceptance.<sup>1</sup> It behooves the drawee who would avoid liability as an acceptor to refuse acceptance when the bill is presented to him ; though the cases do not make it absolutely sure that simple silence and delay on his part would render him liable ; and if he once accepts in writing, and the bill is delivered back to the person presenting it for acceptance, the acceptor's liability to all holders is generally fixed as a principal party, without reference to the person who presented the bill.<sup>2</sup> Where a corporation draws upon itself, or a partner upon his firm for partnership purposes, or an individual on himself,—in these and like instances the instrument seems to be rather a promissory note than a bill of exchange, and at all events the act of drawing is deemed a sufficient acceptance.<sup>3</sup> The legal effect of acceptance is

<sup>1</sup> See *Spear v. Pratt*, 2 Hill, 582 ; *In re Agra, &c. Bank*, L. R. 2 Ch. 391 ; *Spaulding v. Andrews*, 48 Penn. St. 411 ; *Ward v. Allen*, 2 Met. 53 ; *Rees v. Warwick*, 2 B. & Ald. 113 ; *Redf. & Big.* 41-43 ; 1 Pars. 281-286 ; *Byles*, c. 6, § 1.

<sup>2</sup> 1 Pars. 286-291 ; *Grant v. Hunt*, 1 C. B. 44 ; *Redf. & Big.* 43. As to complete or incomplete acceptance, see *Bank of Van Diemen's Land v. Bank of Victoria*, L. R. 3 P. C. 526 ; *Carson v. Russell*, 26 Tex. 452.

<sup>3</sup> *Marion, &c. R. Co. v. Hodge*, 9 Ind. 163 ; *Dougal v. Cowles*, 5 Day, 511 ; *Hasey v. White Pigeon Sugar Co.*, 1 Doug. (Mich.) 193. It is immaterial where one places his name, if his purpose be the execution of the contract. *Rodocanachi v. Buttrick*, 125 Mass. 134. But as to extending this doctrine so as to treat one who writes on the back as though he had written on the face, see *Indorsement, post* ; *Big.* 2d ed. 44, and conflicting cases cited.

Under what circumstances, it may be asked, is a promise to accept equivalent to acceptance ? since it so frequently happens that prudent men in business arrange, before drawing on one another, to what an amount and in what sums their bills shall be honored. In this country it appears to be well settled that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance. *Coolidge v. Payson*, 2 Wheat. 66. And see *Townsley v. Sumrall*, 2 Pet. 170 ; 64 Ala. 1. But an offer to accept a draft may be withdrawn by letter, provided the letter reach the drawer before presentation of the draft for acceptance. *Isley v. Jones*, 12 Gray, 260. Regret has been expressed in many quarters that this doctrine of a virtual acceptance of non-existing

to confirm and establish the bill as originally drawn upon the acceptor; it signifies that the bill was drawn rightly upon him and that he will answer for its due payment.

§ 449. *The Same Subject.*—There is such a thing as a conditional or qualified acceptance; the cases, however, running pretty closely here, and the law being in rather an unsatisfactory state;<sup>1</sup> though the principle is that any acceptance which varies the original tenor of a bill ought to receive the sanction of the drawer and all other prior parties, to make the bill hold good. And a sort of conditional or qualified acceptance is that of an acceptance *supra protest* or for honor, which may be given where the drawee, who declines to accept the bill generally, not being bound to do so, accepts it *supra protest* for some one or more of the parties, and stands rather as indorser than acceptor; or, as more generally happens, where some stranger steps in, after the drawee's refusal to accept and a protest, to save the bill from the disastrous consequences of being publicly dishonored. The law on the subject of acceptance *supra protest*, which is derived from the law merchant, constitutes an exception to the old rule

bills was ever advanced; and, as the English courts do not perhaps go so far, it is well to consider this doctrine as restrained in this country within the above limitations, not to speak of legislation to the contrary. In fact virtual acceptance is a doctrine of common law contract rather than of the law merchant. And hence, in the matter of non-existing bills, a distinction may be proper between the rights of one who afterwards takes on the faith of a promise to accept, and the rights of one who does not; between bills drawn and payable within a reasonable time after the promise, and bills which are not, and so on. See Redf. & Big. 49-51, and cases cited; Wildes v. Savage, 1 Story, 22; Plummer v. Lyman, 49 Maine, 229; Chitty Bills, 284-286; Bank of Ireland v. Archer, 11 M. & W. 383; 1 Pars. 292-300. And see Exchange Bank v. Rice, 98

Mass. 288; 107 Mass. 37; Carr v. National Security Bank, 107 Mass. 45; McCutchen v. Rice, 56 Miss. 455. And in order to bind as acceptor one who has promised to accept a non-existing bill, the bill must be pointed out and described in terms not to be mistaken. Boyce v. Edwards, 4 Pet. 111. Authority to draw at sight for a specified amount is not acceptance of a particular draft, but it implies a promise upon which any *bond fide* holder may rely. Franklin Bank v. Lynch, 52 Md. 270. But authority to draw for a larger amount is utterly inconsistent with such promise. 73 Mo. 172. See further, Carter v. White, 20 Ch. D. 225.

<sup>1</sup> See Redf. & Big. 107, 108; United States v. Bank of Metropolis, 15 Pet. 377; Newhall v. Clark, 3 Cush. 376; Wintermute v. Post, 4 Zab. 420; 1 Pars. 300-312, and cases cited.

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that no man can make himself the creditor of another without the latter's authority or consent; and not only has it no recognized application to a promissory note, but the stranger who would thus acquire the rights of a *bona fide* holder must pay for the honor of all the parties, and of no particular one, and not before but after protest, complying likewise with certain formalities, by way of notice.<sup>1</sup>

Acceptance admits the drawer's signature to be genuine, and the acceptor is liable to an innocent holder for value, though the signature should prove a forgery. And, further, it admits that the bill is drawn on funds in his own hands, and that the payee named is capable of indorsement, though, generally speaking, the acceptor does not warrant indorsements.<sup>2</sup> But an acceptance *supra protest* does not seem to admit the genuineness of any signature, not even that of the drawer.<sup>3</sup> And it may be well to add that a certain duty rests upon the holder of a bill in the matter of seasonable presentment for acceptance; this duty being interpreted, however, in the light of circumstances; and due diligence in presentment applying, as a rule of necessity, rather to bills payable on demand, or at or after sight, than to bills payable at a certain time after date. If the drawee refuses to accept, immediate notice should be given to all prior parties on the incomplete bill to charge them; and sometimes in the case of foreign bills a formal protest will be necessary.<sup>4</sup>

§ 450. **Rights and Duties of the Holder of Negotiable Paper on its Maturity.** — Of the transfer of a bill or note by de-

<sup>1</sup> *Konig v. Bayard*, 1 Pet. 250; *Redf. & Big.* 87, 88; *Gazzam v. Armstrong*, 3 Dana, 554; 1 Pars. 313-320; *Schimmelpennich v. Bayard*, 1 Pet. 264; *Phillips v. Thurn*, L. R. 1 C. P. 463. For an unusual acceptance by "giving credit to the bill," see *Dunavan v. Flynn*, 118 Mass. 537; *Hall v. Steel*, 68 Ill. 231.

<sup>2</sup> *Hortsmann v. Henshaw*, 11 How. 177; *Redf. & Big.* 59-63; *Meacher v. Fort*, 3 Hill (S. C.), 227; *Beeman v.*

*Duck*, 11 M. & W. 251; 1 Pars. 320-323.

<sup>3</sup> *Redf. & Big.* 63; *Wilkinson v. Johnson*, 3 B. & C. 428. See *Phillips v. Thurn*, L. R. 1 C. P. 463.

<sup>4</sup> See *Story Bills*, §§ 231, 273, n.; *Redf. & Big.* 39-41; 1 Pars. 330-352; 2 H. Bl. 565; *Clarke v. Russel*, 3 Dall. 415; *Allen v. Suydam*, 20 Wend. 321; *Walker v. Stetson*, 19 Ohio St. 400.

livery with or without indorsement we shall speak presently at some length; and, not to make the subject too perplexing at the outset, we take now the simplest instance of a presentment for payment on maturity of negotiable paper. We may remark, in passing, however, that one often speaks of "the holder" of negotiable paper, his rights and duties; and that by "the holder," in this connection, is usually meant in law, the owner of it; since, as the text-writers have shown, if a bill or note be in one's possession without title or interest, that person should ordinarily be considered only as the agent of the owner; though possession of the instrument in regular form affords a *prima facie* title.<sup>1</sup> The principal right of the holder of negotiable paper at its maturity is to demand payment; while his principal obligation is to present that paper properly for acceptance or payment, — for one or the other, or both, as the case may be.<sup>2</sup>

§ 451. **Presentment and Demand; how and where made.** — With regard to the presentment of a bill or note, and demand for its payment on maturity, and as respects the formalities to be pursued in case of its dishonor, and the consequent liability of various parties in their proper order, where all these preliminaries were carried out as they should have been, the rules of law are quite peculiar, though their analogy is to be found in the doctrines of guaranty. The general rule is that upon the holder, either personally or by his agent, rests the duty of presenting and making a demand of payment.<sup>3</sup> As to the party of whom demand should be made, the rule

<sup>1</sup> 1 Pars. 253 *et seq.*; *Pettee v. Prout*, 3 Gray, 502.

<sup>2</sup> One who has acquired the paper in good faith, and for valuable consideration, from a party capable of transferring it, is further styled a *bona fide* holder; and the rights of a *bona fide* holder are largely considered, as we shall soon see, in cases where bills or notes have been put into circulation wrongfully, or there is some other element of fraud discoverable. See 1 Pars. 254-280, and cases cited; *Redf. & Big.* 165-280.

<sup>3</sup> The agent, if any, may be authorized without any writing; and, indeed, it is very common for business men, in these days, to put into the bank such bills and notes as they may hold, using the agency of the bank, instead of presenting the paper on maturity themselves. 1 Pars. 357-361; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Bank of Utica v. Smith*, 18 Johns. 230; *Seaver v. Lincoln*, 21 Pick. 267.



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is sufficiently liberal for the holder ; since parties other than the principal one may be charged, on non-payment, if the presentment and demand were made to a person authorized to pay the bill or note, at the right place and time, and in the proper way.<sup>1</sup>

Where a promissory note is not made payable at any particular place, or, as they say, is "payable generally," the rule is that, in order to charge the other parties, demand of payment must be made of the maker personally at his place of business or else at his dwelling-house or other place of abode.<sup>2</sup> But this is a rule subject to proper qualifications ; and, under various circumstances, a demand in any form or manner may be dispensed with. For, after all, it is a question of due diligence ; and wherever a demand is found to be impracticable, proper efforts for that purpose having been made, the parties subsequent to the maker may be held to their usual liabilities.<sup>3</sup> The general result of the cases is

<sup>1</sup> 1 Pars. 361 ; Redf. & Big. 326-330 ; *Matthews v. Haydon*, 2 Esp. 509. Presentment of a partnership note should be at the firm's place of business, or at the dwelling-house of either of the partners. 1 Pars. 362 ; *Erwin v. Downs*, 15 N. Y. 575. See *Granite Bank v. Ayers*, 16 Pick. 392. The paper ought to be presented when payment is formally demanded, for the payer has a right to require its delivery up to him before he pays ; but whether, in case the party demanding has the paper accessible, and the paper is not shown because it is not asked for, the demand will be vitiated, is a point on which the authorities are not decisive. See *Musson v. Lake*, 4 How. 262 ; 44 Barb. 69 ; *Arnold v. Dresser*, 8 Allen, 435 ; Redf. & Big. 296, 297. Mr. Parsons says : "The better rule, as drawn from the authorities, would seem to be, that in order to destroy the validity of the demand, on the ground that the note was not exhibited, the maker or acceptor should, either ex-

pressly or by implication, refuse to pay on that account ; otherwise he will be deemed to have waived his right to require that the note should be shown to him." 1 Pars. 368, with authorities cited. And see *Ocean Bank v. Fant*, 50 N. Y. 474. The rule of presentment is, at all events, considerably affected by local custom, and particularly by bank usage, since banks are, after all, the usual collecting agents of negotiable paper in this country. If a bill or note be lost, it is sufficient to accompany the demand with a presentment of a true copy of the lost paper ; though here it would be fair for the acceptor or maker to require a bond of indemnity before making payment. 1 Pars. 368 ; *Hinsdale v. Miles*, 5 Conn. 331 ; *Posey v. Decatur Bank*, 12 Ala. 802 ; 10 Ad. & E. 616.

<sup>2</sup> *Story Prom. Notes*, § 235 ; *Woodworth v. Bank of America*, 19 Johns. 391.

<sup>3</sup> See *Taylor v. Snyder*, 3 Denio, 145, and cases cited *passim* ; *Wheeler*

that the rule in this respect is a strict one; in other words, that a demand must be made or a proper reason shown for its omission.<sup>1</sup>

What has been said above applies, *mutatis mutandis*, to a bill of exchange. And if the maker or acceptor had neither place of business nor residence in the city or town in which the paper is payable, it is sufficient, in order to charge subsequent parties, that the holder was there on the day of payment ready to receive the money.<sup>2</sup>

A bill or note is often made payable, by its terms, at a particular bank or other place specially designated on its face; and when this is the case, the rule appears fairly settled that, in order to charge subsequent parties to the instrument the paper must be presented and demand made at that place and none other.<sup>3</sup> Yet even here there is some difference in the cases as to the necessity of a demand at the place specified; while it is clear that a presentment and demand there by the holder will be sufficient as against all other sec-

v. Field, 6 Met. 290; Foster v. Julien, 24 N. Y. 28; M'Gruder v. Bank of Washington, 9 Wheat. 598; 3 Kent Com. 96; 1 Pars. 450; Redf. & Big. 313-339; Adams v. Leland, 30 N. Y. 309; Duncan v. McCullough, 4 S. & R. 480. And see § 455, *post*.

<sup>1</sup> While it is not in general sufficient to charge a subsequent party that presentment and demand were made in the street, yet under some circumstances demand at the maker's place of business or residence may be treated as waived; and there is even some reason for supposing that, by parol agreement of all the parties concerned, demand might be made at a particular place, though the note is payable generally, — a proposition which, however, admits of dispute. See Redf. & Big. 326-329, citing Pearson v. Bank of Metropolis, 1 Pet. 89; Pierce v. Whitney, 29 Maine, 188, and other cases. And see King v. Holmes, 11 Penn. St. 456; Seaver v. Lincoln, 21 Pick. 267; 1 Pars. 359, 372, 424.

<sup>2</sup> Boot v. Franklin, 3 Johns. 207; Malden Bank v. Baldwin, 13 Gray, 154. And see 1 Pars. 421-425.

Demand should usually be verbal; but writing will sometimes suffice; however, the demand should be absolutely for payment; and the tenor of the note or bill should not be disregarded. Story Notes, § 242; Langenberger v. Kroeger, 48 Cal. 147. Presentment should be to the party liable, or else his authorized agent. Story Notes, § 251. Demand upon one of a partnership will suffice. Gates v. Beecher, 60 N. Y. 518. Otherwise if they are joint makers. *Ib.* Demand on one who signs as agent of an undisclosed principal is sufficient. Hall v. Bradbury, 40 Conn. 32.

<sup>3</sup> North Bank v. Abbot, 13 Pick. 465; Bank of United States v. Smith, 11 Wheat. 171; Redf. & Big. 329; 1 Pars. 426 *et seq.*, and cases cited; Sanderson v. Bowes, 14 East, 500.

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ondary parties to the paper.<sup>1</sup> Nor is it necessary that in this case the holder himself, or his agent, should make a formal demand; for if the note is at the place on the day of maturity, ready to be delivered up to any party who may be entitled on payment of the amount due, it is sufficiently dishonored if not taken up before the close of business hours; though the customary and more prudent course for charging secondary parties is to make a formal presentment notwithstanding.<sup>2</sup> The place of date of a promissory note payable generally is only *prima facie* the place of payment; and the maker's true residence, if the holder knows it, would control so as to oblige him to demand there rather than elsewhere.<sup>3</sup> As to a bill of exchange, it is held that this may be accepted payable at a particular place in the city or town in which the acceptor resides, though it be not his place of business.<sup>4</sup> And it may also be observed that, in case of payment designated "at any bank" in a certain city, the holder may elect the bank at which to present the paper, and that otherwise he is allowed his choice in case of alternatives.<sup>5</sup>

<sup>1</sup> See 1 Pars. 434-436, and cases cited; *Bank of United States v. Carneal*, 2 Pet. 543; 1 Esp. 3; *Bank of Syracuse v. Hollister*, 17 N. Y. 46; *Wallace v. McConnell*, 13 Pet. 136; *Meyer v. Hibsher*, 47 N. Y. 265; *Malden Bank v. Baldwin*, 13 Gray, 154.

<sup>2</sup> But in a recent case, which will doubtless take its place among the leading American decisions, it is ruled that, although a bill or note payable at a certain bank be in point of fact at that bank when matured, yet if the bank officers have no knowledge of its being there, a sufficient legal presentment and demand, so as to charge secondary parties for non-payment, cannot take place. Here a letter in which the bill was transmitted was laid, with other mail matter, upon the cashier's desk, but, before being taken up by him, slipped through a crack in the desk and disappeared. It was held that there

was no legal presentment, though the party primarily liable had not funds in the bank and did not mean to pay. *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641. See also *Huffaker v. National Bank*, 13 Bush, 644. And, we may add, any loss of this kind carries a presumption of culpable negligence which may be rebutted, and it rests upon the bank officers to shift the blame if they can. *Ib.*

<sup>3</sup> *Taylor v. Snyder*, 3 Denio, 145. Presentment at the maker's former place of business, without inquiry as to his residence, is insufficient. *Talbot v. Commonwealth Bank*, 129 Mass. 67. But the place of date may be presumed the place for presentment, in absence of other agreement. *Wittkowski v. Smith*, 84 N. C. 671.

<sup>4</sup> *Troy City Bank v. Lanman*, 19 N. Y. 477. But see comments in *Redf. & Big. 329*, and cases cited.

<sup>5</sup> See 1 Pars. 438-442, and cases

§ 452. **Presentment and Demand, when made; Days of Grace, etc.** — But at what time should presentment and demand be made? The general rule is that, in order to charge secondary parties to negotiable paper, demand should be made on the day of maturity of the bill or note, not later in general, and certainly not earlier; and demand delayed longer can only be justified under those special circumstances which the law recognizes as a valid excuse.<sup>1</sup> But these words, “day of maturity,” should not be regarded in a literal sense; for usage, aided to no little extent by local statutes, establishes an extension known as “days of grace;” and it is now settled that demand is to be made on the third day after that limited in the negotiable instrument; or, in other words, that the primary party is entitled to his three days of grace. Usage sometimes, though rarely, is allowed to operate a still further extension; but three days is the almost universal limit.<sup>2</sup> Days of grace are allowed only to what are properly bills and notes, — not to checks; nor to notes payable on demand; though as to bills and notes payable at sight, it now appears to be settled, notwithstanding some former doubts on the subject, that unless local statute directs otherwise, days of grace enter into them.<sup>3</sup> Both inland bills of exchange and promissory notes, as well as bills drawn abroad, are subject to the allowance of grace.<sup>4</sup> And while the rule appears to be that if a note or bill without grace falls due on Sunday or a recognized holiday, the paper is not payable until the next secular day, it is certainly settled that, on behalf of a note or bill with allowance of grace, no such extra indulgence can be claimed; for the days of grace are counted consecutively, Sundays and holidays included, and if the third

cited; *Malden Bank v. Baldwin*, 13 Gray, 154.

<sup>1</sup> 1 Pars. 373, 374.

<sup>2</sup> See *Renner v. Bank of Columbia*, 9 Wheat. 581; *Cookendorfer v. Preston*, 4 How. 317; 1 Pars. 394-400, and cases cited.

<sup>3</sup> *Story Bills*, § 377; *Barbour v. Bayon*, 5 La. Ann. 304; *Story Prom. Notes*, § 224; *Oridge v. Sherborne*,

11 M. & W. 374; *Redf. & Big.* 307, 308; 1 Pars. 404-406. For a demand note, three months after date was considered an unreasonable delay in presentment, in *Herrick v. Woolverton*, 41 N. Y. 581.

<sup>4</sup> 1 Pars. 393; 4 T. R. 148; *Bank of Washington v. Triplett*, 1 Pet. 25; *Wood v. Corl*, 4 Met. 203.

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day of grace happens to be Sunday or a holiday, the demand is to be made the day before.<sup>1</sup> With respect to the proper time of day at which presentment and demand should be made, the rule is that it must be made within reasonable hours; and this generally, though not invariably, means, in case of paper payable at a bank, within banking hours; while as concerns a maker or acceptor personally it may range through the whole day to what is properly his bedtime.<sup>2</sup>

§ 453. *Proceedings on Dishonor of the Bill or Note; Notice to Secondary Parties, etc.*—If payment of the bill or note be not made by the primary party on demand and presentment, the holder's next duty is to take such proceedings as to completely charge the secondary parties. Presentment and demand is often made by a notary public, and banks usually employ such officers, so that we often hear of a delinquent person's paper "going to protest." However necessary it is, partly for affording legal evidence of proceedings, that foreign bills should be regularly protested in this way, and however conveniently the same usage may be applied to inland bills and promissory notes, it is settled that by the general law merchant no protest of an inland bill or promissory note is necessary.<sup>3</sup> But notice of dishonor must at all events be sent to the secondary parties with reasonable expedition for fixing their liability, so that each may have fair opportunity of adjusting what he owes, and securing his reciprocal dues against the other parties to the unpaid paper. The law prescribes no particular form for such notice; though it should, either expressly or by just and natural implication, contain in substance a true description of the bill or note so as to manifest its identity; and furthermore

<sup>1</sup> Story Bills, § 337; 1 Pars. 400-403, and cases cited. But local statutes, and perhaps even local usage, may control this rule. *Ib.* See 45 L. T. 210, affirming rule of text as to limitation of the right of action.

<sup>2</sup> Redf. & Big. 311, 312; *Dana v. Sawyer*, 22 Me. 244; Story Bills, § 349; Story Prom. Notes, § 226;

*Cayuga County Bank v. Hunt*, 2 Hill, 635; *Farnsworth v. Allen*, 4 Gray, 453; 1 Pars. 417-421, and cases cited; *Bank of Utica v. Smith*, 18 Johns. 230.

<sup>3</sup> *Union Bank v. Hyde*, 6 Wheat. 572; *Burke v. McKay*, 2 How. 66; 1 Pars. 642-644. The rule is sometimes regulated by statute.

an assertion that it has been duly presented at maturity and dishonored, and (what is frequently left to mere implication) that the holder or other person giving the notice looks to the person to whom the notice is given for reimbursement and indemnity.<sup>1</sup>

Presentation of a bill for payment to a secondary party is not *per se* notice of dishonor; nor can such a party be made liable on a mere notice of non-payment which does not express or imply demand and dishonor.<sup>2</sup> There is some confusion in the cases on this point, and as mercantile methods vary, so do judicial rules; but the tendency is towards a broad construction in matters of mere form, especially in the matter of informing a party that he is looked to for payment, where it might be well enough implied from the fact that the bill was protested.<sup>3</sup>

<sup>1</sup> Story Prom. Notes, § 348, and cases cited; *Bank of Alexandria v. Swann*, 9 Pet. 33; *Hartley v. Case*, 4 B. & C. 339; 1 Pars. 466 *et seq.*; *Artisans' Bank v. Backus*, 36 N. Y. 100. See *Smith v. Mercer*, L. R. 3 Ex. 51. And hence notice to an indorser is not defective by reason of not stating the name of the holder, or by reason of a misdescription of the date of the note in question, or its amount, provided there was no other note payable at the same place and made and indorsed by the same parties. *Mills v. Bank of United States*, 11 Wheat. 431; *Bank of Alexandria v. Swann*, 9 Pet. 33; Redf. & Big. 362, 363; *Bank of Cooperstown v. Woods*, 28 N. Y. 545. And a misdescription of the acceptor's name is not fatal, if the indorser cannot be thereby misled; but if the name were omitted, the notice would be vitiated. *Dennistoun v. Stewart*, 17 How. 606; *Home Ins. Co. v. Green*, 19 N. Y. 518. And see *Brooks v. Blaney*, 62 Me. 466. A misdescription which misleads in fact is fatal to the notice.

Protest should usually be made in the place of dishonor. See 2 Daniel Neg. Instr. § 935; Big. Bills and Notes, 2d ed. 275.

<sup>2</sup> *Leeds Banking Co., in re*, L. R. 1 Eq. 1; *Gilbert v. Dennis*, 3 Met. 495; *Juniata Bank v. Hale*, 16 S. & R. 167. And see *Cook v. Warren*, 88 N. Y. 37.

<sup>3</sup> See 1 Pars. 471 and *n.*; *Caunt v. Thompson*, 7 C. B. 400; Story Prom. Notes, § 353; Redf. & Big. 371-376, and numerous authorities cited. The notice of dishonor is usually given in writing, or by filling up printed blanks; but it seems to be sufficient if oral only, though oral notices would certainly be objectionable on many accounts. Personal service is not necessary, since due diligence is all that the sender is bound to use. And hence, putting a letter into the post-office, where sender and indorser reside in different towns, is sufficient, if properly directed, to fix the liability of the indorser, though the latter never receives it. *Munn v. Baldwin*, 6 Mass. 316; *Jones v. Wardwell*, 6 W. & S. 399; *Scott v. Lifford*, 9 East, 347; Story Prom. Notes, § 328; *ib.* Bills of Exchange, § 300; 1 Pars. 477-485; 4 Allen, 351. But where both parties live in the same town, the American cases have very generally held that the mail is not the appropriate means of conveying notice, or at least not better than the em-

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Due diligence and care in directing the notice is of course to be expected.<sup>1</sup>

§ 454. **The Same Subject.** — Notice of dishonor cannot be given by a mere stranger and outside party, but it may be given by the notary or any agent of the holder ; and notwithstanding some former cases to the contrary, it is also settled at this day that the holder may avail himself of a notice of dishonor given in due time by any party to the bill whose liability to him has been fixed : whence we find the custom sanctioned for the holder to notify the person from whom he took the note and rely, if he choose, upon that person for notifying the prior party, and so on.<sup>2</sup> As concerns the parties to whom notice should be given, Mr. Parsons states the rule (subject to some exceptions) to be that every person who, by and immediately upon the dishonor of the bill or note, and only upon such dishonor, becomes liable to an action, either on the paper or on the consideration for which the paper was given, is entitled to immediate notice.<sup>3</sup>

Many nice questions have arisen as to the time when notice of dishonor should be sent ; and formerly a “reason-

ployment of messengers. *Ib.* And see Redf. & Big. 377 *et seq.* ; *Bowling v. Harrison*, 6 How. 248 ; *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177 ; 1 Am. Lead. Cas. 403 ; *Warren v. Gilman*, 17 Me. 360. Here, again, it is not unlikely that new modifications may have arisen, with the progress of those improvements in our postal system, whereby carriers are employed in the large cities ; and if so, it will be more convenient to the sender, since the employment of one's own private messenger makes him personally responsible until the notice is delivered either personally to the party to be charged, or at his place of business or residence. *Ib.* ; *Van Vechten v. Pruyn*, 13 N. Y. 549. That notice through the post-office is reasonable where the carrier system prevails, see *Prideaux v. Criddle*, L. R. 4 Q. B. 455. And, again, with

increased telegraphic and telephonic facilities, the mode of giving notice may be subject to still further changes. See *Cabot Bank v. Warner*, 10 Allen, 522 ; *Shaylor v. Mix*, 4 Allen, 351.

<sup>1</sup> 1 Pars. 483, 485, 487-499 ; *Story Prom. Notes*, § 323 ; *ib.* Bills, §§ 289, 382. See, besides authorities *supra*, *Bank of Utica v. Bender*, 21 Wend. 643 ; *Bank of Columbia v. Lawrence*, 1 Pet. 578 ; *Walker v. Stetson*, 14 Ohio St. 89 ; *Gladwell v. Turner*, L. R. 5 Ex. 59.

<sup>2</sup> See 1 Pars. 503-506, and cases cited ; *Story Prom. Notes*, §§ 301, 302 ; *ib.* Bills of Exchange, §§ 294, 303 ; 3 Kent Com. 108 ; *Lysaght v. Bryant*, 9 C. B. 46 ; Redf. & Big. 384-388 ; *Beale v. Parish*, 20 N. Y. 407. See *Simpson v. Turney*, 5 Humph. 419 ; *West River Bank v. Taylor*, 34 N. Y. 128.

<sup>3</sup> 1 Pars. 499-503, and cases cited.

able time" was often pronounced the true limit. But the courts have now fixed this period quite definitely.<sup>1</sup>

§ 455. **Strict Presentment and Notice, when excused.** — Under some circumstances the holder of a bill or note is excused from presentment and notice within the period usually prescribed. For the general rule imposes, as we have already seen, only reasonable diligence on the holder's part; and wherever it was not in the holder's power, by the exercise of reasonable diligence, to present the paper and demand payment at the usual time, he is excused from the consequences, provided he still exercised such reasonable diligence as the circumstances of the case permit. Thus, inevitable or unavoidable accident, war, epidemic or other legal obstacle, not attributable to the holder's fault, excuses the failure of presentment, provided he make presentment as soon afterward

<sup>1</sup> The rule therefore is, that notice of the dishonor, when sent between parties residing in different places, should be put into the post-office early enough to be sent by the mail of the day succeeding the last day of grace; and if two mails leave on such succeeding day, it is sufficient to deposit the notice in time to go by either mail; or if there be no mail on such succeeding day, or perhaps, too, if the mail of that day be closed before a reasonable time after early business hours, then in season for the next regular mail. Thus much diligence is essential; though notice may, of course, be sent on the day of dishonor. Where sent between parties residing in the same place, notice may be given at any time before the expiration of the day after dishonor. And in the case of several successive indorsements, the rule is that each indorser has the same allowance of time within which to notify antecedent parties, after himself receiving notice, that the holder has, as just stated. But the party, whether holder or indorser, who notifies, must in all cases send

his notices to antecedent parties at the same time that he would to his immediate indorser; and he cannot be allowed as many days as there are intermediate parties. See Redf. & Big. 390-396, and cases cited; Bank of Alexandria v. Swann, 9 Pet. 33; 1 Pars. 506-520, and cases cited; Story Prom. Notes, § 319 *et seq.*; Howard v. Ives, 1 Hill, 263; Downs v. Planters' Bank, 1 Sm. & M. 261; Chick v. Pillsbury, 24 Me. 458. The rule allowing a day does not apply as between agent of the holder and the holder residing at a distance. Leeds Banking Co., *in re*, L. R. 1 Eq. 1.

The rule concerning giving notice of dishonor is well stated by Brett, J., in a late English case, *Horne v. Rouquette*, 3 Q. B. Div. 514. And see *King v. Crowell*, 61 Me. 244; *Shelburne Falls Bank v. Townsley*, 102 Mass. 177; *Smith v. Poillon*, 87 N. Y. 590. Notice of dishonor sent upon a demand too late will not charge an indorser. 17 Kans. 592. As to charging an indorser by a notice, notwithstanding his recent removal, see 48 Conn. 432; 51 Vt. 471.



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as he is able.<sup>1</sup> A familiar instance where immediate presentment is found impossible occurs in case of the maker's or acceptor's death previous to the maturity of the paper; though here notice to the executor or administrator, if there be one, would be proper; and, while the decisions are not quite clear on this point, it would seem advisable, if not absolutely necessary, to present the paper at maturity, so far as may be, and give notice to the parties chargeable with a secondary liability that such death has occurred, and of the matter of administration, so that each of these parties may take all suitable precautions on his own behalf; and this, too, even where, as is generally the case in our several States, the personal representative would be exempt from suit for a considerable time.<sup>2</sup> The death of the holder before the paper matures affords still better excuse for a delay in presentment; and the holder's executor or administrator is allowed in such cases a reasonable time after appointment, within which to make the presentment.<sup>3</sup> The better opinion is that any drawer who had no funds in the drawee's hands at the time of drawing, and no right to draw, and who ought reasonably to have believed that his draft would not be paid, is not entitled to strict notice of dishonor.<sup>4</sup> The absconding of the maker or acceptor, his removal into another jurisdiction, or sailing abroad leaving no usual place of business, home, or known agent in the State, or the continuance of war,—all

<sup>1</sup> *Windham Bank v. Norton*, 22 Conn. 213. See Redf. & Big. 414-422; *Schofield v. Baker*, 3 Wend. 488; 1 Pars. 442 *et seq.*

<sup>2</sup> See Redf. & Big. 429, and cases cited; *Juniata Bank v. Hale*, 16 S. & R. 157; 1 Pars. 445; *Union Bank v. Magruder*, 7 Pet. 287; *Gower v. Moore*, 25 Me. 16; *Pierce v. Cate*, 12 Cush. 190. Demand on the day ought to be excused where the death occurred so near the time of payment that it was impossible to take out letters of administration or executorship. See *Haslett v. Kunhardt*, Rice, 189; *Oriental Bank v. Blake*, 22 Pick.

206; *Caunt v. Thompson*, 7 C. B. 400. As to death of the party entitled to notice of dishonor, see *Goodnow v. Warren*, 122 Mass. 79; *Mathewson v. Strafford Bank*, 45 N. H. 104.

<sup>3</sup> 1 Pars. 444; *White v. Stoddard*, 11 Gray, 258.

<sup>4</sup> *Hopkirk v. Page*, 2 Brock. 20; *Orear v. McDonald*, 9 Gill, 350; *Kinsley v. Robinson*, 21 Pick. 327; *Rhett v. Poe*, 2 How. 457; *Oliver v. Bank of Tennessee*, 11 Humph. 74; *Wood v. Price*, 46 Ill. 435; Redf. & Big. 441-443, and cases *pro* and *con* cited; 1 Pars. 532 *et seq.*

of these are instances in which, if the accompanying circumstances be such as to justify absence or delay in presentment, the excuse of tardiness or non-presentment is considered sufficient, especially if presentment was attempted in vain.<sup>1</sup> But it should be observed that circumstances such as we have mentioned will not necessarily excuse notice to an indorser; for in general the secondary parties should have their notice, and opportunity to pursue remedies as among themselves, even though the excuse holds good as regards the party primarily liable.<sup>2</sup>

Excuses for the usual demand or notice, then, are often because it was sufficiently impossible to make such demand or give such notice; sometimes, again, because, owing to his misconduct, the party had no right to expect it; and sometimes because the right to a demand or notice, though once existing, had been substantially waived by the party's knowledge of the circumstances in the case or by his own acts and admissions.<sup>3</sup> A party, for instance, will not unfrequently

<sup>1</sup> See *Williams v. Bank of United States*, 2 Pet. 96; *Barton v. Baker*, 1 S. & R. 334; *Lehman v. Jones*, 1 W. & S. 126; *McGruder v. Bank of Washington*, 9 Wheat. 598; *Redf. & Big.* 447-467, and cases cited; 1 Pars. 446-465. Though the party promising has become bankrupt or insolvent, demand should be made upon him; but a demand in such case upon his assignee would also be proper, if he refused. *Barton v. Baker*, 1 S. & R. 334; *Story Notes*, § 286; *Big.* 2d ed. 244, 378; *Fugitt v. Nixon*, 44 Mo. 295; 83 N. C. 225.

Where a note is made by a resident of the State, who, before it matures, moves permanently elsewhere, leaving no one to represent him, the holder need not follow him to present the note for payment. *Adams v. Leland*, 30 N. Y. 309; *Taylor v. Snyder*, 3 Denio, 145; *Whitely v. Allen*, 56 Iowa, 224. *Qu.* whether presentment at former place of abode in the State is needful in such case;

it is certainly desirable, so far as testing whether the party removing left funds and an agent behind. Cf. 6 Met. 290; *contra*, 3 Ohio, 308, and 24 N. Y. 28. As to an absconding maker, there should be, according to *Pierce v. Cate*, 12 Cush. 190, some demand or inquiry for him; though former cases ruled less stringently. The reason is, that justice to the indorser who has not waived his own rights requires that proper means be taken to charge the principal party.

See, further, *Gwin v. Moore*, 79 Ind. 103; *Cox v. National Bank*, 100 U. S. 704.

As to due time for presenting an instrument payable "on demand" or "at sight," see *supra*, § 452. And see, as to laches in presenting a note "payable on demand after date," *Crim v. Starkweather*, 88 N. Y. 211.

<sup>2</sup> *Redf. & Big.* 443; *Byles Bills*, 10th Eng. ed. 293; 1 Pars. 446, 523 *et seq.*

<sup>3</sup> See 1 Pars. 443, 521 *et seq.*; *Ford*

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indorse a note "waiving demand and notice." But concerning any such waiver, the holder should not expect too much from the courts; for, at least, a waiver of notice simply does not embrace a waiver of demand; while an indorser's agreement to pay absolutely should be clear and distinct, and with full understanding of essential circumstances, in order that the usual demand and notice be dispensed with.<sup>1</sup> And whether a waiver of protest will excuse both demand and notice is a matter of some uncertainty.<sup>2</sup>

§ 456. **Negotiability; Transfer by Indorsement.** — And now, to come more directly to those negotiable qualities which bills and notes possess. Of the peculiarities which attend the easy transfer of such instruments, thereby giving them an immense popularity among business men, we have spoken elsewhere.<sup>3</sup> This transfer is sometimes with, and sometimes without, indorsement. The word "indorsement," as applied to bills and notes, has a sort of technical signification, peculiar to mercantile dealings; and while one who indorses is naturally supposed to write on the back of some instrument, he who indorses negotiable paper, in a full sense, indorses and transfers; he not only so writes, but he also passes the bill or note over by way of something similar to an assignment, leaving himself as a rule liable somewhat, though not altogether, like a surety or guarantor, for the value of the paper and its final payment according to the terms therein expressed.<sup>4</sup>

So far as the mere transfer of title in a bill or note is concerned, the rule is that no precise form of words is necessary — delivery of the paper with suitable intent being the main

*v. Dallam*, 3 Cold. 67. See the recent case of *Yeager v. Farwell*, 13 Wall. 6.

<sup>1</sup> *Berkshire Bank v. Jones*, 6 Mass. 524; *Backus v. Shipherd*, 11 Wend. 629; *Lane v. Steward*, 20 Me. 98; *Redf. & Big.* 468-476, and cases cited; 17 Pick. 332; 2 T. R. 713; *Sigerson v. Mathews*, 20 How. 496; 1 Pars. 575 *et seq.*; *Voorhies v. Attee*, 29 Iowa, 49.

<sup>2</sup> See *Union Bank v. Hyde*, 6 Wheat. 572, and other cases cited; *Redf. & Big.* 469; 1 Pars. 584, 585; *Wilkins v. Gillis*, 20 La. Ann. 538.

As to the notarial charges, expenses, interest, re-exchange, &c., allowable on protested paper, see 1 Pars. 633-664; 2 Kent Com. 95-120.

<sup>3</sup> *Supra*, §§ 84, 85.

<sup>4</sup> See 2 Pars. 1, 2.

essential to make that title complete ; but when we come to consider the matter of indorsement, we find the rule rather more strict ; since for one to assume the character of an indorser is to incur certain perilous risks which he might desire to have avoided, unless by his writing he negatives such liability. To charge one as indorser, there must be an intent manifested on his part to stand in that relation. It is certain that a person cannot be held as indorser at law merchant, by a mere promise to indorse, or unless his name is written in some way on the paper ; and yet a liberal principle of construction is applied under the influence of common law contracts in determining what shall constitute a legal indorsement ; the manifest intent of the parties controlling, rather than the form of words or the manner of the signature, as in determining upon the validity of the instrument itself.<sup>1</sup> The signature should be in the handwriting of the indorser, or by some one whom he has thereunto authorized.<sup>2</sup> Indorsement is usually, and perhaps universally, and always properly, on the back of the bill or note, as the term imports ; and any number of persons may indorse successively the same instrument, beginning with the original payee. An indorsement is sometimes expressed in a sort of formula, and the indorser will often write, over his own name, a direction to pay to a certain person or his order, or in other ways make his indorsement restrictive, special, or with enlarged effect.<sup>3</sup>

<sup>1</sup> 2 Pars. 14-22, and cases cited ; *Fenn v. Harrison*, 3 T. R. 757 ; *Haskell v. Mitchell*, 53 Me. 468 ; *Partridge v. Davis*, 20 Vt. 499 ; Redf. & Big. 110-112 ; *Brown v. Butchers' Bank*, 6 Hill, 443. Mr. Parsons considers the decisions more lax than they should be, in this respect. *Hall v. Newcomb*, 7 Hill, 416 ; *Denton v. Peters*, L. R. 5 Q. B. 475. One whose indorsement has been fraudulently procured to negotiable paper, and who was not guilty of fraud or negligence, is not liable even to a *bonâ fide* holder. *Foster v. McKinnon*, L. R. 4 C. P. 704.

<sup>2</sup> 2 Pars. 16 ; *Weed v. Carpenter*,

10 Wend. 403. As to the wife's indorsement, see *Stevens v. Beals*, 10 Cush. 291 ; Redf. & Big. 164. As to indorsement of partnership paper by a partner in his own name, see *Estabrook v. Smith*, 6 Gray, 570 ; Redf. & Big. 160, 161. And see *Michigan Bank v. Eldred*, 9 Wall. 544.

<sup>3</sup> Thus, to indorse "without recourse" implies that the indorsement is merely a formal one, and that the holder must not regard the person indorsing as subjecting himself to the usual responsibilities of an indorser. But by indorsing "demand and notice waived," the indorser enlarges his liability, by declining to stand

But the most common method of indorsing is in blank, — that is, by writing the name and nothing more: and the effect of this is to give the transferee of the paper an unqualified power of disposition over it, while the transferring party himself abides by his full legal liability as an indorser. The immediate effect of an indorsement in blank is to make the paper payable to the transferee as bearer, rather than as indorsee; and notes indorsed in blank, like those original payable to bearer, go by delivery; mere possession evincing *prima facie* ownership in both cases, and the only important difference being that the paper indorsed in blank carries the safeguard of a secondary party, who is liable as indorser.<sup>1</sup> In general, the holder of a bill or note upon which there is a blank indorsement has the right to restrict, though not to enlarge, the indorser's liability; thus, over the indorser's signature, he may write "without recourse," which restricts such liability, or a direction to pay to his own order, whereby the negotiability of the instrument would become restrained accordingly; while he cannot write the words "demand and notice waived." But a holder cannot alter the directions or restrictions already given or made by indorsers themselves, and must make out the chain to himself through them, until there is a blank indorsement; this he may fill, payable to himself, and disregard or strike out those that follow.<sup>2</sup> The indorser, properly speaking, should be a regular party to the negotiable paper; though if one not a party to a bill or note places his name on the back of it, he incurs a liability which, according to the rule of some States, is substantially that of an indorser, while in other States he is treated like a maker, or surety, or guarantor of the paper.<sup>3</sup> Paper indorsed in

upon strict formalities. Indorsements are sometimes "in trust for," "to the use of," &c. See 2 Pars. 21.

<sup>1</sup> Big. 2d ed. 168; Gurney v. Womersley, 4 E. & B. 133; Merriam v. Wolcott, 3 Allen, 258; Allen v. Clark, 49 Vt. 390. But as to whether this rule has limitations sustained upon actual proof, see Big. 168 *et seq.*, and cases cited.

<sup>2</sup> 2 Pars. 19. And see *ib.* 14-22, and cases cited; Peacock v. Rhodes, 2 Doug. 633; Cole v. Cushing, 8 Pick. 48; Cower v. Tatum, 24 Ark. 13; Elliott v. Chesnut, 30 Md. 562.

<sup>3</sup> See Redf. & Big. 155, 159, and cases cited; Rey v. Simpson, 22 How. 150; Greenough v. Smeed, 3 Ohio St. 415; Hall v. Newcomb, 7 Hill, 416.

blank, then, carries all the advantage which sale with a clear title can give; but, on the other hand, the easier it may be for a stranger to acquire title, the more slippery becomes the holder's own grasp; and hence the precautions by way of restriction upon negotiability often adopted. As to restriction, upon an indorser's liability, a further discussion is suggested.

§ 457. **The Same Subject.**— By the act of indorsement, whether in blank or to some particular person's order, provided it be unqualified, the party indorsing makes a new contract with the indorsee or holder and the parties following; and to this effect, that the paper is due and payable according to its tenor; that the acceptor, maker, or previous indorsers will pay the same at maturity, when called upon and notified; and that he, the present indorser, will pay the same if they do not.<sup>1</sup>

The rights and liabilities of an indorser, as one of the secondary parties who may be held responsible in case of the dishonor of a bill or note, we have already incidentally considered; and there are other mutual obligations, as between himself and his indorsee, which differ not from those attending the simple transfer of negotiable paper by delivery. But here it should be said that, an indorsement being a new and independent contract, every indorser of a bill or note makes a new contract with his indorsee, which may in any case be different from that which he received; that his implied admission of signature and capacity applies to every party to the paper, prior to the date of his own indorsement; and that as to the indorsee, he has all the rights of his immediate indorser, and sometimes more.<sup>2</sup> And indorsement, we should bear in mind, may be made after maturity of the paper as well as before; the only essential difference being that in the one case the date of payment is fixed expressly by the parties, while in the other the law assumes a reasonable time on demand.<sup>3</sup>

<sup>1</sup> 2 Pars. 23.

<sup>2</sup> See 2 Pars. 23–27, and cases cited.

<sup>3</sup> *Leavitt v. Putnam*, 3 Comst. 494; *Story Prom. Notes*, § 178; *ib.* *Bills*,

§§ 220–223. See 2 Pars. 9–14, as to presumptions in case of indorsement when the paper is overdue.

Indorsement is a warranty to all

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§ 458. **Effect of Transfer by Mere Delivery: Title of *Bona Fide* Holder for Value.**—The rule concerning paper transferable by mere delivery is, that all bills and notes payable to bearer, or indorsed to bearer, or indorsed in blank and not afterwards restricted by the holder, can be transferred by mere delivery; and title is obtainable accordingly, by any *bona fide* transferee for value without notice of infirmity of title though he should purchase it of a thief. And, as a general rule, one who transfers paper by delivery only is no longer a party to that paper, but his liability ceases with his interest therein. He is, to be sure, responsible, on the usual principle of sales, for the genuineness of the instrument and its existing signatures, and in fact has been said to warrant the title to be that purported; but beyond this, and as to any future honor or dishonor of the paper, or solvency of the parties, he promises nothing and is held for nothing.<sup>1</sup>

On the other hand, the party who takes negotiable paper transferable by delivery acquires in general an absolute property therein and may recover upon the instrument, provided only he took it in good faith and for a valuable consideration before it became overdue, without notice of adverse title.<sup>2</sup> The presumption of good title in the holder, under such

but guilty holders, or at least a conclusive admission, that the signatures are genuine and made by parties having authority to pass the title, and that the paper is genuine. *State Bank v. Fearing*, 16 Pick. 533; *Remsen v. Graves*, 41 N. Y. 471; *Condon v. Pearce*, 43 Md. 83; *Braithwaite v. Gardiner*, 8 Q. B. 473; *Turner v. Keller*, 66 N. Y. 66; Big. 2d ed. 166. And it is a well-settled rule of law that in an action upon the indorsement the plaintiff need not prove the genuineness of prior signatures or of the paper itself; for it is enough to prove the indorsement. But as to an action brought against the acceptor of a bill, or the maker of a note, an indorsee may have to prove the indorsements he relies upon; hence

forgery may be alleged by such defendants. *State Bank v. Fearing*, *supra*.

<sup>1</sup> 2 Pars. 37-41, and cases cited; *Aldrich v. Jackson*, 5 R. I. 218; *Gompertz v. Bartlett*, 2 Ell. & B. 849.

<sup>2</sup> 2 Pars. 42 *et seq.*, and cases cited. See, further, §§ 84, 85, *supra*.

Whether the paper in any case was transferred for a new or an old consideration, in payment of some pre-existing debt or as security merely, — these and analogous questions which have much disturbed the judicial mind for years bear sometimes heavily upon a holder's rights; and as the matter is one of considerable detail and greater perplexity, we merely allude to it in passing. See *supra*, chapter on Debts; 1 Para. 218-228. And see *Swift v.*

circumstances, is in these days very strong, and it is generally deemed sufficient for him to produce the paper which he sues upon, and leave the parties thus presumably liable to impeach his title if they can.<sup>1</sup> Even as to overdue paper, so long as it is ordinarily current, the cases are somewhat lenient; forbearance stopping apparently at the point of discredit or dishonor, whatever that point may be.<sup>2</sup>

Tyson, 16 Pet. 1, and other cases cited in valuable note, Redf. & Big. 186-217.

<sup>1</sup> Redf. & Big., 213-217, and cases cited; *Pettee v. Prout*, 3 Gray, 502; *Davis v. M'Cready*, 17 N. Y. 230; *Craig v. Sibbett*, 15 Penn. St. 238; *Brewster v. McCardel*, 8 Wend. 478; *Jones v. Gordon*, 2 App. Cas. 616; *Brooklyn City R. v. Republic Bank*, 102 U. S. 14.

<sup>2</sup> Redf. & Big. ib.

Of course the *bonâ fide* holder of negotiable paper is not affected by any knowledge acquired after the perfection of his own title. *Hoge v. Lansing*, 35 N. Y. 136. But one must have paid value for a note or bill in order to maintain his standing as a *bonâ fide* holder; and equitable defences in this respect are not to be excluded. See *Harpham v. Haynes*, 30 Ill. 404; *Livingston v. Littell*, 15 Wis. 218; Redf. & Big. 214, 215. And if, too, the party presumably liable can show that the purchaser of current negotiable paper acted in bad faith, believing at the time of the purchase that there was some infirmity about the paper, he can impeach the title; though, according to the later English and American decisions, the burden of proof is upon him. *Goodman v. Harvey*, 4 Ad. & Ell. 870; overruling *Gill v. Cubitt*, 3 B. & C. 466, which is constantly pronounced bad law in this country. Redf. & Big. 216, 257; *Hamilton v. Vought*, 5 Vroom, 187; *Jones v. Gordon*, 2 App. Cas. 616.

While a failure of consideration,

partial or total, or even fraud between the prior parties, is thus seen to be no defence to the title of a *bonâ fide* holder for value, taking the paper before it was discredited or overdue, without notice of infirmity therein; so, too, it appears to be well settled that one who purchases commercial paper for value, with notice of defect in its inception, from a *bonâ fide* holder without such notice, may recover, inasmuch as he stands upon the rights of the latter. *Hascall v. Whitmore*, 19 Me. 102; *Lickbarrow v. Mason*, 2 T. R. 63; *Story Prom. Notes*, § 191; Redf. & Big. 262. See *Fisher v. Leland*, 4 Cush. 456. If the paper bears on its face the evidence of its own infirmity, the holder may be denied the right to recover, because sufficiently warned before he took it; but in general, and where the paper itself is free from suspicion, the title of the holder for value is only to be overcome by proof of bad faith. Cf. *Goodman v. Simonds*, 20 How. 343; *Fowler v. Brantly*, 14 Pet. 318. See Redf. & Big. 239, 257. The effect of a statute declaring certain paper void *ab initio*—supposing the statute to be constitutional, of course,—is more sweeping; and such paper would be valueless even in the hands of a *bonâ fide* holder. Though this is to be distinguished from statutes which make a certain consideration illegal, and no more. See *Bayley v. Taber*, 5 Mass. 286; *Paton v. Coit*, 5 Mich. 505; *Story Prom. Notes*, § 192; *Aurora v. West*, 22 Ind. 88. And see *Brown v. Tarkington*, 3



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§ 459. **Rules applicable to Accommodation Paper.**— We hear sometimes of “accommodation paper.” By this phrase is denoted those bills of exchange or promissory notes which are drawn, made, accepted, or indorsed without any consideration, — for the “accommodation,” as it were, or convenience of some party, and generally in order to enable him to raise money on the credit of the person thus affording the use of his name. Accommodation paper in the hands of the party to whom it is made, or for whose benefit the accommodation is given, is open to the defence of a want of consideration; but when taken by third persons in the usual course of business, it is governed by the usual rules of negotiable paper.<sup>1</sup> Hence, though the accommodation indorser has a good defence against the payee for whose benefit he indorsed, it is usually no defence against the indorsee purchasing for value before maturity, that the latter knew, when he purchased, that it was accommodation paper.<sup>2</sup>

But there are some peculiar doctrines which grow out of a misappropriation of paper given for accommodation: where, for instance, it is given for a special purpose and is used otherwise; and while the holder's rights, under such circumstances, are not clearly defined in the decisions, it seems clear that if the holder took the paper with notice of a fraudulent diversion to the accommodating party's injury, the accommodating party can relieve himself of liability; while it is equally certain that to defend successfully against any such

Wall. 377. As to equities against one who takes an “overdue” bill or note, see 2 Pars. Bills and Notes, 603, 604; Burrough v. Moss, 10 B. & C. 558; Britton v. Bishop, 11 Vt. 70; Redf. & Big. 275, 276. And as to the extent of “set off” in such cases, see Redf. & Big. ib.; Baxter v. Little, 6 Met. 7. For further applying this rule of protecting a *bonâ fide* holder to lost and stolen negotiable instruments, see *post*, vol. ii. part iv. c. 1.

An agent, trustee, pledgee, &c., may usually sue in his own name; so favorably is any rightful holder's

convenience regarded. *Pearce v. Austin*, 4 Whart. 489; *Dugan v. United States*, 3 Wheat. 172; Big. 394, and cases cited. See *Dodge v. Brown*, 113 Mass. 323; *Hays v. Hathorn*, 74 N. Y. 486.

<sup>1</sup> See 2 Kent Com. 86; 1 Pars. 256, 327; 2 ib. 27, 437.

<sup>2</sup> *Ib.*; *Grant v. Ellicott*, 7 Wend. 227; *Charles v. Marsden*, 1 Taunt. 224. See *Chester v. Dorr*, 41 N. Y. 279, as to the transfer of accommodation paper after its maturity. And see *Jones v. Berryhill*, 25 Iowa, 289.

misappropriation, the accommodating party must prove that the holder had prior notice of the misapplication.<sup>1</sup> Yet that the holder can recover in any event what he actually advanced for the note and no more, is sustained by numerous authorities.<sup>2</sup>

§ 460. **Discharge of Drawer or Indorser from Liability.** — There are various instances in which a drawer or indorser may be discharged from liability by the acts of prior parties, whether it be by some satisfaction of the demand represented by the bill or note, or because the effect of such acts was to prejudice his own rights and remedies. It is a familiar principle of law that the release of the principal operates to discharge the surety; indorsement is much in the nature of a contract of suretyship; and if the holder of a promissory note release the first indorser, this discharges, presumptively at least, the subsequent indorsers.<sup>3</sup> But the mere agreement by the holder with the drawer of a bill, for delay, made without consideration and not communicated, and hence not valid, does not discharge the indorser.<sup>4</sup> Each successive indorser to negotiable paper stands as a surety not only of the maker or acceptor, but also for all parties indorsing before him; though not, of course, for any indorser subsequent to himself; and hence prior indorsers are sureties together of the holder of the paper and entitled to subrogation as among themselves.

<sup>1</sup> *Stoddard v. Kimball*, 6 Cush. 469; *Mohawk Bank v. Corey*, 1 Hill, 513; *Small v. Smith*, 1 Denio, 583. See *Farmers' Bank v. Rathbone*, 26 Vt. 19. And see *Davidson v. Lanier*, 4 Wall. 447; *Spitler v. James*, 32 Ind. 202.

<sup>2</sup> See *Allaire v. Hartshorne*, 1 Zab. 665, and other cases cited; Redf. & Big. 270. The question how far an indorsement of paper not yet issued, which indorsement was requested by a person contemplating taking it as an "accommodation" to him, binds the indorser, is considered in *Yeager v. Farwell*, 13 Wall. 6. And as to

the rights of one who takes accommodation paper which is overdue, see conflicting cases cited in Redf. & Big. 216, 217.

<sup>3</sup> *Newcomb v. Raynor*, 21 Wend. 108.

<sup>4</sup> *McLemore v. Powell*, 12 Wheat. 554. See, further, as to discharge of indorser, drawer, &c., Redf. & Big. 544-596, 617-642, and cases cited and examined; 2 Pars. 208-254; *Smith v. Morrill*, 54 Maine, 58; *Okie v. Spencer*, 2 Whart. 253. As to extension of time by a mere delay to sue, see *Allen v. Brown*, 124 Mass. 77. But difficulty arises as to the effect

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§ 461. Failure of Consideration as between Original Parties.

— We may here add that, in an action on negotiable paper between the original parties, a total or partial failure of the consideration can be set up in defence to the same extent as if the action were founded on the consideration.<sup>1</sup> But an original lender or payee upon an accepted bill of exchange is not affected in his rights and remedies by want or failure of consideration as between the acceptor and the drawer.<sup>2</sup> And the rule is a familiar one that one who, *bonâ fide*, purchases or advances upon negotiable paper, according to its purport and without previous notice of infirmity in title, is entitled to protection accordingly, notwithstanding the equities that might be good as between the original parties.<sup>3</sup>

§ 462. Questions relative to Forged or Altered Paper. — Questions of forgery often arise in connection with bills and notes, since commercial paper is peculiarly liable to fraudulent making and alteration; and the equities of innocent parties concerned in the circulation of the paper being equal, it is often a delicate matter to decide who shall bear the loss. As a rule, a payment received in forged paper is not good, and if there has been no negligence in the receiving party he may recover. But where one of two innocent parties must suffer, he who has misled the other, or has omitted his duty, must bear the loss.<sup>4</sup>

of taking additional security. See *Overend v. Oriental Co.*, L. R. 7 H. L. 348; *Barron v. Cady*, 40 Mich. 259; Big. 2d ed. 606, 608.

<sup>1</sup> *Wyckoff v. Runyon*, 4 Vroom, 107. And see 1 Pars. Notes and Bills, 175-203, and cases cited.

<sup>2</sup> A bank discounting such a bill stands towards the acceptor in the position of original lender. *Goetz v. Kansas City Bank*, 119 U. S. 551; 12 Wall. 181.

<sup>3</sup> *King v. Doane*, 139 U. S. 166.

<sup>4</sup> *McKleroy v. Southern Bank*, 14 La. Ann. 458; *Mather v. Lord Maidstone*, 18 C. B. 273; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333; *Hortsman v. Henshaw*, 11 How.

177; Redf. & Big. 643-665; *Merchants' Nat. Bank v. Nat. Eagle Bank*, 101 Mass. 281; 4 Comst. 149; *Colson v. Arnot*, 57 N. Y. 253. And thus the Supreme Court of the United States decides that the loss occurring by the acceptance of a bill of exchange, with forged bills of lading attached, falls on the acceptor, and not on a bank which *bonâ fide* and in course of business afterwards discounts the drafts. *Hoffman v. Bank of Milwaukee*, 12 Wall. 181. And see, further, *Brook v. Hook*, L. R. 6 Ex. 89; *Grant v. Chambers*, 1 Vroom, 323. In *Garrard v. Haddan*, 67 Penn. St. 82, the rule is announced that where a negotiable note is impercept-

Akin to the topic of forgery is that of alterations in negotiable paper, which, if fraudulently made in material particulars, should vitiate the instrument. But alterations honestly made by mutual consent of the parties, or to correct errors, or in immaterial respects, are treated by the courts with indulgence.<sup>1</sup> Where a blank has been wrongfully filled by one who received the paper with power to fill, as in case of trusting one with a blank note, the violation of confidence cannot be set up against *bona fide* holders for value; but authority to alter so as to commit an essential forgery is not to be predicated of any one.<sup>2</sup>

## CHAPTER VIII.

### MISCELLANEOUS NEGOTIABLE AND QUASI-NEGOTIABLE INSTRUMENTS.

§ 463. *Miscellaneous Instruments More or Less Negotiable.* — That distinguishing quality which the law terms “negotia-

ably altered as to amount after delivery, the maker having carelessly left a blank space which was made available for the alteration, the maker and not the innocent holder must suffer. But see *Wade v. Withington*, 1 Allen, 561.

<sup>1</sup> See 2 Pars. 544-582, and cases cited, where this subject is fully discussed. And see *Kountz v. Kennedy*, 63 Penn. St. 187; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18; *Murray v. Graham*, 29 Iowa, 520.

<sup>2</sup> See *Wood v. Steele*, 6 Wall. 80; *Brooks v. Allen*, 62 Ind. 401; *Woorall v. Gheen*, 39 Penn. St. 388; 43 Conn. 391; 100 Mass. 376. As to lost and stolen negotiable instruments in questions of title, see *post*, vol. II. part IV. c. 1. A bank in discounting commercial paper does not guarantee the genuineness of documents attached thereto as collateral security.

*Goetz v. Kansas City Bank*, 119 U. S. 551.

For text-books which treat fully of bills and notes, citing English and American cases, the reader is referred to the latest editions of Judge Story's Works on Bills of Exchange and Promissory Notes (in which, unwisely for a later generation, the two subjects were treated separately); Parsons on Bills and Notes; and the more recent and comprehensive work of Mr. John W. Daniel on Negotiable Instruments. Of Redfield & Bigelow's Leading Cases on Bills and Notes, a second edition, revised by Prof. M. M. Bigelow, the surviving author, and known as Bigelow's Bills and Notes, has lately been issued; it is carefully prepared and illustrates leading principles quite clearly. See also Students' edition of this book (1893).

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bility" belongs not alone to bills and notes, but in a greater or less degree to various other instruments. Of bank-bills, which under one aspect are a sort of promissory note payable to bearer on demand, we have already had occasion to speak.<sup>1</sup> And now as to the remaining classes of negotiable or *quasi*-negotiable instruments.

§ 464. **Checks and their Characteristics.**—I. Checks (or "cheques") are found in common use between banks or bankers and their customers; and an instrument of this sort may be defined as a written order or request, addressed to a bank or banker, requesting the payment of a certain sum of money to a person therein named, or to such person "or bearer," or to such person "or order."<sup>2</sup> Upon the addition of the words "or bearer," or those other words "or order," or (what seldom occurs) the simple designation of a person, depends the question of negotiability; since in the matter of delivery and a transfer of legal title, with or without requiring indorsement, the rule is substantially that applicable to bills and notes which we described in the preceding chapter; and a check after its existing tenor may be non-negotiable, negotiable by indorsement, or transferable by mere delivery, according as it is made payable to a particular person, or to him or order, or to bearer, or is indorsed either in blank or with corresponding words of restriction.

§ 465. **Checks distinguished from Bills of Exchange, Drafts, etc.**—Some have written and spoken rather confusedly of checks; as though they were but a species of bill of exchange payable on demand. But there are important distinctions between a check and a bill; and while bills and notes are usually intended for debt negotiations and postponing a settlement, the main purpose of a check is to make

<sup>1</sup> *Supra*, § 351. A writing which indicates no payee is not a check. *McIntosh v. Lytle*, 26 Minn. 336.

<sup>2</sup> See 2 Pars. Bills and Notes, 57 *et seq.*; Bouv. Dict. "Check;" Chitty Bills, 18th ed. 545. The printed blank of an American check is usually as follows:

.....BANK.
Boston.....188 .
Dolls .....Cts. ....
Pay to..... [or bearer or else or order].....Dollars 100
No.....
.....
An instrument drawn upon a bank,

immediate and expeditious payment by a means more convenient to the parties concerned than the transfer of coin, legal-tender currency, or bank-notes. In England the use of checks is regulated considerably by statute; but with us the unwritten law shapes the principles suitable to such instruments with more freedom; and our whole banking system, too, differs from that of the mother country.<sup>1</sup>

But if a check resembles any one kind of negotiable paper more than another, it is certainly that of a bill of exchange, — of a bill payable on demand, though the check itself expresses no “demand.” And one of the essentials of a check, indeed, appears to be that it shall be payable when presented; for which reason a draft for an amount made payable on some future day designated would not be a check at all.<sup>2</sup> The word “draft” we take to have a broader signification, sufficient to cover the drawing for a designated sum upon any individual or corporation, not upon a banker or a bank merely. Drafts, too, are spoken of as payable at some future day, as well as on demand or at sight; the term “draft” is applied to bills of exchange and checks, and even to more doubtful instruments; and perhaps the element of distance may usually be found whenever the word “draft” is contrasted with “check,” rather than meant to include it; for a check, being payable at one’s bank, is almost invariably drawn and dated in the neighborhood of the bank, whereas a draft proper might be made in a foreign country upon one’s agent at home.<sup>3</sup>

simply directing payment, to a party named, of a specified sum of money on deposit with the drawee, without designating a future day of payment is a check. *Bull v. Kasson Nat. Bank*, 123 U. S. 105.

<sup>1</sup> See *Morrison v. Bailey*, 5 Ohio St. 13; 2 Pars. Notes and Bills, 57, 58; *In re Brown*, 2 Story, 502, *per* Story, J. And see *Harker v. Anderson*, 21 Wend. 372, disapproved by *Little v. Phoenix Bank*, 2 Hill, 425; *Woodruff v. Merchants’ Bank*, 25

Wend. 673; 6 Hill, 174. See, as to banking system, *supra*, §§ 350, 351.

<sup>2</sup> *Morrison v. Bailey*, 5 Ohio St. 13.

<sup>3</sup> A check is not, however, literally an inland bill. For the drawer may reside in one State or country (*e.g.* New York), and draw upon his bank in another State or country (*e.g.* New Jersey); and yet the instrument is a check. *Heywood v. Pickering*, L. R. 9 Q. B. 428; *Roberts v. Corbin*, 26 Iowa, 315. See *Rapalje’s*

The leading points of difference between bills of exchange and checks are these. *First*, a check is drawn upon an existing and sufficient fund, and is an absolute transfer or appropriation to the holder of so much money on deposit in the hands of the drawee; whereas a bill of exchange is not always or necessarily drawn upon actual funds in the hands of the drawee, but very frequently drawn in anticipation of funds, or upon some credit previously arranged. *Second*, the drawer of a check is always the principal; whereas the drawer of a bill frequently stands in the position of a mere surety. *Third*, days of grace are allowed on bills of exchange; but checks are always payable without any allowance of grace. *Fourth*, in case of a bill of exchange, the drawer is discharged by default of a due presentment; whereas mere delay, as between the holder and drawer of a check, in presenting the check in due time for payment, would not discharge the drawer, unless he had been thereby injured, and even then only to the extent of his loss. *Fifth*, a check requires no acceptance, and the only presentment made is that for payment; with, perhaps, a modern exception in the matter of certifying checks, of which we shall speak presently.<sup>1</sup>

§ 466. **The Same Subject.** — As to the drawing of a check against an existing fund, we may add that the existence of a fund for drawing is always to be supposed; but whether the appropriation of the fund is made absolute in every instance by the act of drawing a check is a matter of doubt, to say the least; for though, as a rule, the drawer's bank is bound to pay his check whenever it is presented, yet, as the agent of the drawer, the bank ought usually to refuse payment if so directed by the principal in good season; for the duty which the bank owes in honoring checks is rather to its depositor than the public. Where, however, a wanton or fraudulent

Dict. "Draft," Bouvier, *ib.*; 1 Story, U. S. 22.

<sup>1</sup> See Bartley, J., in *Morrison v. Bailey*, 5 Ohio St. 13; Redf. & Big. 718-720; Keene v. Beard, 8 C. B.

x. s. 372. But see *Andrew v. Blachly*, 11 Ohio St. 89. As to the points of similarity between a bill and a check, see *infra*, § 469.

refusal of the bank to pay any check can be shown by the holder, such refusal, if operating to the holder's injury, might perhaps constitute a good foundation for an action against the bank.<sup>1</sup> The drawer, if wronged, has his own cause of action against the bank for the breach of an implied contract to honor promptly the customer's checks; which of itself is good reason why the bank should not ordinarily be compelled to respond to the holder.<sup>2</sup> And it is settled in this country that, as a rule, the holder of a bank check cannot sue the bank for refusing payment, in the absence of proof that the check was accepted by the bank or charged against the drawer;<sup>3</sup> nor does such unaccepted or uncertified check create any enforceable lien on the drawer's bank deposit.<sup>4</sup>

Days of grace, we have said, are not allowed on checks; yet as authorities differ somewhat in marking the limits between bills and checks, so do they likewise differ in their statements on this point, and as to the general doctrine of post-dated checks.<sup>5</sup>

<sup>1</sup> See 2 Pars. 59-61, and cases cited; *Bellamy v. Marjoribanks*, 7 Ex. 389; *Mandeville v. Welch*, 5 Wheat. 277; *Chapman v. White*, 2 Seld. 412; *St. John v. Homans*, 8 Mo. 382; *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82. But see *Roberts v. Corbin*, 26 Iowa, 315.

<sup>2</sup> 2 Pars. 62-64, and cases cited; *Marzetti v. Williams*, 1 B. & Ad. 415; 133 U. S. 566.

<sup>3</sup> See *Bank of Republic v. Millard*, 10 Wall. 152; *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325; 5 Col. 185; *St. Louis R. v. Johnston*, 133 U. S. 566. A check, according to the now accepted view, is only a request of the customer of a bank to pay the whole or part of the customer's deposit to a particular person, or to order, or to bearer. Until presented and accepted it is inchoate; it vests no title or interest, legal or equitable to the fund. Before acceptance, the drawer may withdraw his deposit. The bank owes no duty

to the holder of a check until it is presented for payment. Knowledge that checks have been drawn does not render it obligatory upon the bank to retain the deposit to meet them. *Church, C. J.*, in *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325.

An order, check, or draft, must be drawn upon a particular specified fund, in order to operate even as an equitable assignment of that fund. *Ib.* And see *Hopkinson v. Forster*, L. R. 19 Eq. 74. Still less is there an equitable assignment of the fund, by the mere act of giving a check, where the deposit is much less than the amount of the check. *Florence Co. v. Brown*, 124 U. S. 385. Cf. as to right of the holder of a check to sue the bank, 23 La. Ann. 49; 80 Ill. 212.

<sup>4</sup> *Florence Co. v. Brown*, 124 U. S. 385.

<sup>5</sup> 2 Pars. Notes and Bills, 67-69, and cases cited. Days of grace are not allowed on a check payable at a



Since checks are payable on presentment, the rule requiring acceptance, as in the case of bills, must be necessarily inapplicable as a rule. Undoubtedly a check ought to be presented within a reasonable time for payment; for it is inconvenient, if not injurious, to the drawer to have to keep funds waiting for uncertain or lengthy delays on the holder's part, and with incidental risk of the bank's continuous solvency. But as to the exact period within which a check must necessarily be presented at the bank for payment, there is no definite rule which either mercantile usage or the modern authorities sustain; while there is abundant reason to believe that a drawer at least would not be wholly or in part discharged in the courts at this day from payment of his check, because of any delay of presentment on the holder's part, unless he could show that he had suffered some material injury by the delay, sufficient to offset correspondingly the value of the check.<sup>1</sup> A failure of the drawee, meanwhile, would seem sufficient, under circumstances of unreasonable delay on the holder's part, to discharge the drawer.<sup>2</sup> But a check, generally

future day named. *Champion v. Gordon*, 70 Penn. St. 474. A post-dated check is not invalid. 24 Hun. 281.

<sup>1</sup> *Alexander v. Burchfield*, 7 Man. & G. 1061; *Little v. Phoenix Bank*, 2 Hill, 425; 2 Pars. 73, 74. See *Willets v. Paine*, 43 Ill. 432; *Hopkins v. Ware*, L. R. 4 Ex. 268; *Smith v. Miller*, 43 N. Y. 171; *Pack v. Thomas*, 13 Sm. & M. 11.

<sup>2</sup> In a recent English case the failure to present a check for nearly four weeks—there being "a reasonable chance, though not a certainty," that it would have been paid if presented at once—was held to discharge a debtor whose agent had meantime absconded. *Hopkins v. Ware*, L. R. 4 Ex. 268. The general rule is here maintained, that a creditor who takes from his debtor's agent, on account of the debt, the check of the agent, is bound to present it for payment within a reasonable time; and that, if he fails to do so, and by his delay

alters for the worse the debtor's position, the debtor is discharged, although he was not a party to the check. *Ib.* And see the strict rule laid down by a majority of the court, on a state of facts somewhat similar, in the recent case of *Smith v. Miller*, 43 N. Y. 171. But immediate presentation is not requisite as a rule. 42 N. Y. 538; *Simpson v. Pacific Ins. Co.*, 44 Cal. 139.

But the drawer of a check, it is held, is not released by a mere want of notice, although he has the funds on deposit. *Daniels v. Kyle*, 1 Ga. 304; *Little v. Phoenix Bank*, 2 Hill, 359. See *Laws v. Rand*, 3 C. B. N. s. 442. And if a check is presented a long time after date, and payment thereof is refused, not on account of a failure, but because the drawer has closed his account or withdrawn his funds, the latter is still liable. *Robinson v. Hawksford*, 9 Q. B. 52; 2 Pars. 72. See *Skillman v. Titus*, 3 Vroom, 96.

speaking, is not due until its presentation, and both bank and drawer may derive an actual advantage, in some instances, by way of interest upon the deposit, where the check is presented tardily.

§ 467. **Effect of certifying a Check.**— While, in strictness, a check is not capable of “acceptance,” as the term is applied to ordinary bills of exchange, there is a sort of marking or certifying of checks quite common in the large cities, as modern business is conducted. Here a check is presented to the bank, to be certified as “good” by the cashier or other suitable officer of the bank: and, upon the certificate being given, the check circulates longer as cash or its substitute, with that additional credit which the name of the bank gives it. Such checks are to be found both in England and America; the name applied to them with which we are most familiar is that of “certified checks;” and the usual mode of certifying is by the bank officer writing upon the face of the check the word “good” over his signature.

What is the effect of a certificate like this? And to what extent shall the bank be considered as bound by such acts of its officers? There are earlier conflicting decisions on this point in some of the State courts.<sup>1</sup> During our civil conflict,

<sup>1</sup> This subject was considered by the Supreme Court of Massachusetts in 1845. Here a check had been drawn on a bank which had no funds of the drawer on deposit; and the teller of the bank, nevertheless, certified the check to be good. The court manifestly regarded a power of certifying, like this, to be in fact a power to pledge the credit of the bank to its customers; and their decision, to the effect that the bank should in the present instance go free, was based upon the assumption that only the president and directors of the bank could exercise an authority so extensive, unless specially delegating it to others; and that a teller, as such, had no implied authority to certify a check so as to bind the bank for payment. Evidence of a limited,

but not a general usage, for the bank-teller to certify in this manner, was deemed insufficient to render the bank liable. *Mussey v. Eagle Bank*, 9 Met. 306. But some twelve years later, a similar question came before the Court of Appeals in New York; and here it was decided that a *bonâ fide* holder, for value, of a negotiable check certified to be good by the paying teller of the bank on which it is drawn, whose authority to certify is limited to cases where the bank has funds of the drawer to meet the check, can recover of the bank the amount of the check, though the drawer had no funds in the bank, and though the certification by the teller was in violation of his duty, and for the drawer's accommodation. *Farmers' Bank v. Butchers' Bank*, 16 N. Y.

substitutes for money circulated, and a national banking system superseded the old local banks of State creation ; so that finally the Supreme Court of the United States was called upon to settle for the country the legal status of such instruments. This was done in *Merchants' Bank v. State Bank* ;<sup>1</sup> and the decision was, in substance, that cashiers of banks have power, when acting *bonâ fide* and in the ordinary course of business, to certify as "good" checks drawn upon their respective banks, and to bind the banks thereby, though no such general usage appear,—this rule being applied to national banks. And concerning the cashier's general powers, it was held that evidence of powers habitually exercised by him, with the knowledge and acquiescence of the bank, defines and establishes those powers as to the public ; provided those powers were such as the directors might, without violation of the bank charter, confer on the cashier.<sup>2</sup> This important decision will probably be accepted by the State tribunals hereafter, as conclusive of the law of "certified checks" in the United States, so far as concerns the liability of national banks and their officers upon such instruments. A certification of a check in short, by the proper bank agency, pledges the bank's credit for payment of the check, in favor of an innocent holder for value, though in point of fact the drawer had at the time no fund on deposit.

But certified checks, though they may pass from hand to

125, Comstock, J., dissenting. And see *Irving Bank v. Wetherald*, 36 N. Y. 335; *Pope v. Bank of Albion*, 59 Barb. 226 ; 2 Pars. 74-77. In the opinion here pronounced, the Massachusetts doctrine was unfavorably criticised ; yet the evidence now adduced appeared much stronger than before ; for it was shown not only that the teller was in the habit of certifying the checks of customers, with the knowledge of the officers of the bank, but that he was furnished with a book for the express purpose of keeping a memorandum of certified checks.

<sup>1</sup> *Merchants' Bank v. State Bank*, 10 Wall. 604, — a famous case which grew out of transactions in Boston, and which was decided in 1871. The doctrine of New York was in this case adopted, in preference to that of Massachusetts. But the power to pledge a bank's credit was affirmed of a higher agent than a teller ; though resting upon an implied or express agency from the bank's direction to one subordinate officer or another.

<sup>2</sup> 10 Wall. 604. The opinion was delivered by Swayne, J. ; Clifford and Davis, JJ., dissenting.

hand as cash, are still neither cash nor currency, strictly speaking; and some payment, reasonably sooner or later, should be made thereon. And it is held that the bank upon which a certified check is drawn cannot set off a claim on the holder against the amount of deposit transferred by the check;<sup>1</sup> for their only privity consists in the bank's guaranty that the check will be duly honored for payment.

§ 468. **Payment of Checks; Duties of Banker, etc.** — Although a check ought to be always drawn upon funds, banks are sometimes in the habit of sustaining the credit of such of their customers as are in good standing, by honoring their checks even when, through inadvertence or something worse, the corresponding funds are wanting. But any such habit is so bad that it ought never to grow into a recognized legal or binding usage.<sup>2</sup> While the check first presented for payment ought to be first paid, and the first payment applied to wiping out a depositor's balance, and so on; yet if all the checks presented at once go beyond the funds in hand, or there are funds for a partial but not a complete payment of any single check which may have been presented, the bank apparently is not obliged to make any *pro rata* or partial payment; nor is a holder bound to receive it.<sup>3</sup> A banker of both holder and drawer will be presumed, if he take a check of the latter from the former, to receive it as the former's agent; and the mere retention of a check after deposit for a reasonable time, sufficiently long to enable the bank to ascertain whether the check is good or not, — say until the next day, — constitutes

<sup>1</sup> *Brown v. Leckie*, 43 Ill. 497. On the point whether the effect of certifying a check is (unlike that of accepting a bill) to discharge the drawer, the latest State cases are discordant. *First Nat. Bank v. Leach*, 52 N. Y. 350; *contra*, *Bickford v. First Nat. Bank*, 42 Ill. 238. But the true rule appears to depend upon whether the bank's certification was or was not at the instance and for the benefit of the holder, without the drawer's intervention. See *Minot v. Russ*, 156 Mass. 458; *Born v. First Nat. Bank*,

123 Ind. 78; 94 U. S. 343. After certifying a check the bank is bound to pay it, regardless of later instructions from the drawer to the contrary. *Freund v. Importers' Bank*, 76 N. Y. 352.

<sup>2</sup> See 2 Pars. 77; *Lancaster Bank v. Woodward*, 18 Penn. St. 357; *Houghton v. First National Bank*, 26 Wis. 663.

<sup>3</sup> *In re Brown*, 2 Story, 502; 2 Pars. 78. And see *Carew v. Duckworth*, L. R. 4 Ex. 313.

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no conclusive acceptance or promise of payment on the part of the bank, whether both drawer and holder are its customers, or the holder alone.<sup>1</sup> A bank should not pay a check after notice that it was lost; nor before it is due, if on time; nor after notice of the drawer's insolvency; nor (since a bank is the drawer's agent) after notice of the drawer's death.<sup>2</sup>

§ 469. **Points of Resemblance between Check and Bill of Exchange; Effect of Indorsement, etc.** — But while a check, in many respects, is found to be unlike an inland bill of exchange, payable on demand, in others they strongly resemble one another. A check, like a bill or note, may be indorsed; and the method of conferring the quality of negotiability, again, of restraining or taking it quite away, is much the same in all negotiable instruments. Checks may be drawn to a person by name, in which case it is at least prudent for the bank to take his indorsement before making payment; or to a person "or bearer," being thereby made capable of passing from hand to hand, by a simple delivery; or to a person "or order," in which case the check can be transferred, and should be paid after the person has written his name on the back and not before. And subsequent holders by means of a restrictive indorsement may convert a check once payable to bearer to one payable on order. The writing on the back of a check, however, may or may not be an "indorsement," in the strict legal sense; and whether the party who writes his name there is made subject to the surety liabilities which were considered in our last chapter will depend upon circumstances. For the usual object aimed at where checks are drawn payable to "order" rather than to "bearer" is simply to guard against loss of the fund; and, besides, to secure, on return of the cancelled check from the bank, a sort of receipt of the payee, for the drawer's convenience. But, certainly, a check is capable of indorsement in the full legal sense; and one who indorses it

<sup>1</sup> 2 Pars. 77, *n.*; *Boyd v. Emmer-*  
*son*, 2 A. & E. 184; *Overman v.*  
*Hoboken City Bank*, 1 Vroom, 61.  
And see *Peterson v. Union Nat.*  
*Bank*, 52 Penn. St. 206, where some

element of fraud on the holder's  
part appeared; 69 Ind. 479.

<sup>2</sup> 2 Pars. 81, 82, and cases cited,  
mostly English. See *Tate v. Hilbert*,  
2 Ves. Jr. 118.

with the intent of making himself an indorser to his transferee is chargeable as such at the suit of a subsequent *bonâ fide* holder, and ought to be notified when the check is dishonored, on the usual principles.<sup>1</sup> And the rule is that a check expressed payable to bearer or indorsed in blank confers the usual presumptive title upon the holder.<sup>2</sup>

Where the indorsement of a check was intended merely to transfer one's legal rights, not to incur the responsibility of an indorser, that intention will be given effect.<sup>3</sup> And in general the courts appear less inclined to fasten liabilities upon the indorser of a check than upon the indorser of a bill or note; while the holder of a check finds considerably more favor as against a drawee, who ought not to have drawn.<sup>4</sup>

§ 470. **Effect of paying a Forged or Altered Check.** — The better opinion is, that where the drawer's own negligence causes the drawee, who exercises reasonable care, to believe that a forged or altered check was genuine and payable according to its face, and the drawee accordingly pays the

<sup>1</sup> See *Keene v. Beard*, 8 C. B. n. s. 372; 2 Pars. 58, 59, 71.

<sup>2</sup> *Ib.*

<sup>3</sup> *Kimmel v. Bittner*, 62 Penn. St. 203.

<sup>4</sup> Thus, the mere fact that one in regular course of business in good faith and for value receives a check at some brief period, such as ten days after it was drawn and dated, does not subject him to the equities which prevail between the original parties to the check; though a demand bill or note might perhaps, under the same circumstances, be considered as overdue. *Ames v. Merriam*, 98 Mass. 294. And see, further, *Hare v. Henty*, 10 C. B. n. s. 65; *Prideaux v. Criddle*, L. R. 4 Q. B. 455. And it is a rule that the drawer of a draft or check, in case he has drawn against no funds, is not entitled to notice of its dishonor before he can be held liable for non-acceptance or non-payment. Even though there were some funds in the bank

to his credit, so long as they were insufficient to meet the check, and the drawer had no reasonable expectation that the check would be paid, the holder is excused from giving strict notice of dishonor. *Carew v. Duckworth*, L. R. 4 Ex. 313. And see *Lawrence v. Schmidt*, 35 Ill. 440, which was a case where only depreciated currency was in the drawee's hands. *Primâ facie*, the drawer of a check should have early notice of its dishonor; hence legal excuse for omission to give such notice ought to be shown where the holder has failed to give it; still, if the holder can show that the drawer has suffered no prejudice by his omission, he can maintain his action against him. 2 Big. Bills and Notes, 2d ed. 116, and cases cited; 44 Wis. 479; *Heywood v. Pickering*, L. R. 9 Q. B. 428. And see *Fletcher v. Pierson*, 69 Ind. 281.

For an action against the indorser of a check, who indorsed "waiving

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check in good faith, the drawer must suffer loss.<sup>1</sup> But where a bank pays a forged check, without some such excuse, whether the forgery be that of the drawer's name, or of some indorser (the check being made payable to order), the loss falls upon the bank. And if a bank pays a forged check, without the excuse of the drawer's negligence, payment cannot be charged against him; though, if the check was altered, the drawer will be liable for the original amount.<sup>2</sup>

§ 470 *a*. **Memorandum Checks.** — A peculiar class of checks may be found in modern business, known as memorandum checks. In form they differ from ordinary checks only in the usual insertion of the abbreviation "mem." in the heading, with perhaps a cancellation of the printed name of the bank. The effect of such a check is to create, on the drawer's behalf, an absolute contract to pay the *bond fide* holder of the paper unconditionally, waiving the condition of presentment at the bank and other formalities.<sup>3</sup> A check drawn in the ordinary form cannot be shown to be a memorandum check.<sup>4</sup>

§ 471. **Bills of Lading; how far Negotiable.** — II. Besides bills, notes, and checks, there are other instruments which resemble them in the characteristic of negotiability; and the strong tendency of modern times is to introduce new or modified kinds of personal property, which may present this negotiable advantage to parties seeking investment. Bills of lading, as we have said, are sometimes considered negotiable; though the better opinion is that they are *quasi-nego-*

demand and notice," see *Emery v. Hobson*, 62 Me. 578. That a check was dishonored when transferred does not discharge the drawer. Loss to the drawer by delay in presentment is matter of defence. *Cowing v. Altman*, 79 N. Y. 167.

<sup>1</sup> See *Young v. Grote*, 4 Bing. 253; *Lickbarrow v. Mason*, 2 T. R. 63; 2 Pars. 80.

<sup>2</sup> 2 Pars. 80, 81, and cases cited; *Morgan v. Bank of N. Y.*, 1 Kern. 404; *Robarts v. Tucker*, 16 Q. B. 560;

*Orr v. Union Bank*, 1 H. L. Cas. 513. And see last chapter. One who has collected funds from the drawee on a forged indorsement may be sued for the money obtained by the person whose name was forged. *Shaffer v. McKee*, 19 Ohio St. 526. See, further, *Thomson v. British Bank*, 82 N. Y. 1.

<sup>3</sup> *Franklin Bank v. Freeman*, 16 Pick. 535; 4 Gray, 108; *American Emigrant Co. v. Clark*, 47 Iowa, 672; 2 Daniel, Neg. Instr. §§ 1583, 1584.

<sup>4</sup> *Ib.*

tiable only.<sup>1</sup> And such is the language usually applied to them in the later cases.<sup>2</sup> The word "assigns" is commonly used instead of "order;" and then, again, the bill of lading is evidence, not of an incorporeal right, but of corporeal property, the goods or cargo on transit—which, after all, is what one feels particularly interested in obtaining.<sup>3</sup> It is true that the law merchant makes a bill of lading so far transferable by indorsement (and this notwithstanding the use of the word "assigns") that an indorsee may sue the owner or ship-master, founding his title to the goods on his possession of the bill of lading; yet the property in goods for which a bill of lading is given may be legally transferred for consideration, without indorsing and delivering the bill at all.<sup>4</sup> This latter course, to be sure, is an unusual one; but, furthermore, the holder of a bill of lading cannot generally sue upon it at law, in his own name, more than any ordinary assignee of incorporeal property, though he is permitted to do so in courts of admiralty;<sup>5</sup> and local statute at this day often confers such right. While, then, bills, notes, and checks not only evince money rights, but float them, as it were, that which a bill of lading represents may be styled a right to take, hold, and enjoy certain corporeal chattels; so that in some respects the primitive bill of lading would appear like a mere scrap of written evidence, to be produced in proof of one's title, much as the purchaser of chairs would show the receipted bill of the furniture dealer, to establish that the goods were his, and not the dealer's.

But, on the whole, bills of lading are more decidedly

<sup>1</sup> *Supra*, § 85. And see 1 *Ld. Raym.* 271; *Lickbarrow v. Mason*, 2 T. R. 63; *The Water Witch*, 1 Bl. 494. The bank, having paid on a "raised" check, may recover the amount from the payee. 67 *Ind.* 500. And see, as to paying a forged check, *Nat. Bank v. Bangs*, 106 *Mass.* 441. The question of the contributing fraud or negligence of a payee appears material here. *Ib.*

<sup>2</sup> 1 *Pars. Shipping*, 193; *cases post.*

<sup>3</sup> *Supra*, § 321. It is both a receipt and a contract as to the goods described. *Ib.*

<sup>4</sup> *Cf.* 1 *Pars. Shipping*, 193, 195; *Allen v. Williams*, 12 *Pick.* 297; *Stanton v. Eager*, 16 *Pick.* 467.

<sup>5</sup> *Thompson v. Dominy*, 14 *M. & W.* 402; *Tindall v. Taylor*, 4 *Ell. & B.* 219; *Cobb v. Howard*, 3 *Blatch.* 524; 1 *Pars. Shipping*, 193; *Gurney v. Behrend*, 3 *Ell. & B.* 633; *The Rebecca*, 5 *Rob. Adm.* 102.



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negotiable in their character than ordinary bills of sale; and to a great extent the method of selling cargoes and goods on transit or of raising money by their pledge must be *sui generis*; so it is fit that such instruments should occupy, as they unquestionably do, the midway position of *quasi*-negotiable. A bill of lading may be indorsed with restrictions or conditions which will be construed to much the same effect as the corresponding indorsement of a bill or note.<sup>1</sup> Such an

<sup>1</sup> The law merchant establishes an exception in favor of bills of lading, so that upon the indorsement and delivery of such an instrument an indorsee can sue the owner or master as the *prima facie* owner of the goods therein specified. He can even sue in admiralty in his own name; but this is on the equitable view of an assignment, apparently, since in the common-law courts he is not generally allowed to do so. See *Howard v. Shepherd*, 9 C. B. 297; *Thompson v. Dominy*, 14 M. & W. 402; *Cobb v. Howard*, 3 Bl. C. C. 524; 1 Pars. Shipping, 192, 193; *The Figlia Maggiore*, L. R. 2 Ad. & Ecc. 106. That the consignee for value who is indorsee of the bill of lading may maintain a libel for tortious collision, by which the goods were lost, see *The Vaughan*, 14 Wall. 258. In a recent English case an indorsement of a bill of lading "without recourse" was held to be valid; and the ship-owners, having delivered the goods in pursuance of it, were not permitted to sue the original consignees. *Lewis v. M'Kee*, L. R. 2 Ex. 37. But see s. c. L. R. 4 Ex. 58. Whenever, indeed, the bill contains a condition, or the indorsement is made upon a condition, the possessor of the bill must satisfy that condition in claiming the goods. *Walley v. Montgomery*, 3 East, 585. Of course, an indorsement and delivery is binding only where the party having the right to indorse does so upon good consideration. 1 Pars. Shipping, 193-195.

A bill of lading and a bill of exchange covering the goods are sometimes enclosed by the consignor in one letter to the purchaser; and where this is done, the rule, as recognized in England, is that the bill of exchange must be accepted or the bill of lading cannot be retained. Where the bill of exchange is not accepted, but the bill of lading is retained, the consignee has no right to the goods. *Shepherd v. Harrison*, L. R. 5 H. L. 116. And where the consignor indorses a bill of lading "to order or assigns" in blank, and deposits as security at a bank, and upon satisfaction of the debt the bill of lading is reindorsed and delivered back to him, he is remitted to all his original rights as against the ship-owners. *The Karnak*, L. R. 2 Ad. & Ecc. 289.

For the rights of parties where a bill of lading is attached to and forwarded with a time draft, see *Nat. Bank v. Merchants' Bank*, 91 U. S. 92; *Marine Bank v. Wright*, 48 N. Y. 1; *Lanfear v. Blossom*, 1 La. Ann. 148. In *National Bank v. Merchants' Bank*, *supra*, this question is fully discussed; and a conclusion to be deduced is, that a bill of lading is only *quasi*-negotiable; and that the holder thereof, who has become such by indorsement and by discounting the draft drawn against the consigned property, succeeds merely to the rights of the shipper, and has no greater right to demand acceptance of the accompanying bill. And see

instrument is, in short, at once a receipt and a contract of carriage ; it acknowledges the receipt of the property (which receipt is liable to correction) and contracts to carry and deliver over.<sup>1</sup>

There are various modern enactments, both in England and this country, tending to invest the transferee of a bill of lading, whether by way of pledge or sale, with the substantial advantages of a holder by indorsement.<sup>2</sup> And title to the goods, either absolutely or by way of pledge, may be acquired by a transfer of the bill of lading.<sup>3</sup> Nevertheless, it by no means follows, even though a statute makes bills of lading "negotiable" by indorsement and delivery, that all the consequences incident to the possession of a bill or note payable to bearer or a blank indorsee become conferred.<sup>4</sup> Bills of lading are in these days issued for goods whether by land or water transit ; but there appears no essential dis-

Emery v. Irving Nat. Bank, 25 Ohio St. 360.

<sup>1</sup> See St. Louis R. v. Knight, 122 U. S. 79.

<sup>2</sup> See English act 18 & 19 Vict. c. 111 (1855), which gives the consignee or indorsee full right to sue. And see Shaw v. Merchants' Bank, 101 U. S. 557.

<sup>3</sup> Commercial Bank v. Pfeiffer, 22 Hun, 327. The property described in the bill of lading may thus become appropriated even though the bill be transferred without formal indorsement. Holmes v. Bailey, 92 Penn. St. 57.

<sup>4</sup> Thus, as to the *bonâ fide* purchaser of a lost or stolen bill of lading, the privilege applicable to negotiable paper is not presumed to avail him. Shaw v. Merchants' Bank, 101 U. S. 557. Cf. Tiedeman v. Knox, 53 Md. 612 ; Schoul. Bailm. § 190. And the first of triplicate bills of lading takes no priority, but the second or third may be *bonâ fide* regarded by the carrier, unless he is notified seasonably to the contrary.

Glyn v. East India Dock Co., 7 App. Cas. 591. There may be a variance between different bills of lading, or a misdescription of property in such an instrument where the receipt of the carrier is subject to explanation. See *supra*, § 321 ; 23 Hun, 283 ; Schoul. Bailm. § 190. Possession of goods acquired under a bill of lading is sufficient to maintain an action against one who does not show a better title. Adams v. O'Connor, 100 Mass. 515 ; Murray v. Warner, 55 N. H. 546.

Bills of lading fraudulently signed and issued, the goods never having been received, do not by the better opinion render the carrier liable even to a *bonâ fide* holder. Baltimore R. v. Wilkens, 44 Md. 11 ; Pollard v. Vinton, 105 U. S. 7 ; 130 U. S. 416. Cf. Armour v. Michigan Cent. R., 65 N. Y. 111.

As to bills of lading, see, more generally, Schoul. Bailm. §§ 190, 387, 475-477, 533-537, and other works treating of the law of carriers.

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inction between the two classes as to the rights and duties conferred thereby.

§ 472. **Warehouse Receipts; whether Negotiable.** — Warehouse receipts, in accordance with the modern business tendencies, are now often treated as *quasi*-negotiable, to much the same extent as bills of lading. But they are not negotiable in the full sense; and even though a statute should confer negotiable qualities upon this class of instruments, it could not fairly render the warehouseman a guarantor of the title of property placed in his custody; <sup>1</sup> while, too, his receipt of goods might be subject to correction.

§ 473. **Letters of Credit, Circular Notes, Certificates of Deposit, etc.** — III. Letters of credit are not negotiable, though in some particulars they resemble bills of exchange. A., going abroad, takes for convenience a letter from B., by which B. requests his foreign banker to honor the drafts of A. to a certain extent, and charge the same to B.'s account; and this letter is called a letter of credit. Had B. drawn directly and at once on the foreign banker for the whole amount in A.'s favor, the instrument would have been a bill of exchange; but being a letter of credit, the doctrine of negotiable instruments does not apply. <sup>2</sup> In these days of foreign travel, while rates of exchange between different countries vary and fluctuate, letters of credit are found exceedingly useful to tourists. <sup>3</sup>

Circular notes, too, as they are called, which refine a little upon the simple letter of credit, and may be useful to travellers abroad, are generally, but not always, for specific sums; and they are purchased from a banking-house, with

<sup>1</sup> *Insurance Co. v. Kiger*, 103 U. S. 352. Warehouse receipts made payable to bearer are not negotiable; there must be a written indorsement and delivery. 6 Mo. App. 172.

<sup>2</sup> The convenience afforded by letters of credit is obvious, and this convenience must often be mutual, as between A. and B.; for not only may B.'s liability be less, while it cannot be more than the limit he has set, but A. may draw for the amount

named in such sums and at such times as suit his own convenience, — lessening, if he pleases, his own indebtedness to A. by not drawing for the full amount.

<sup>3</sup> A letter of credit is liberally available in favor of the person who advances on the faith of it; whether as the person solely addressed, or on a general letter. *Lawrason v. Mason*, 3 Cr. 492; *Pollock v. Helm*, 54 Miss. 1.

the design of being used at any of the banker's agents or correspondents in various foreign places. Like the common letter of credit, these circular notes enable one to dispense with the necessity of carrying large sums upon his person. The nearer all such letters and circulars approximate to the bill of exchange, the more nearly do they come within the designation of negotiable instruments; yet, as a general rule, though transferable by indorsement, they are thus far treated in the courts as being governed by the law of ordinary contracts, rather than that which applies to bills and notes.<sup>1</sup>

But the "certificate of deposit," as it is generally termed in this country, — or, in other words, that certificate which a bank or other depositary issues to an individual upon his paying over a sum of money, by way of irregular deposit, or for the purchase of the certificate, — is treated as in effect the promissory note of such depositary, and subject to the usual rules of negotiable paper. Certificates of this description usually state that the party in question has deposited that sum, payable to himself or order on demand, or on return of the certificate properly indorsed.<sup>2</sup> The advantage of using certificates of deposit is seen in the substitution of the larger credit of the bank for that of the individual, who may thus transfer the certificate to distant parties at pleasure, or carry it on his person until he is ready to use the money. Such transactions are to be distinguished from the ordinary deposits of a customer at his bank, with the use of a deposit book; for to sue the bank, in the latter case, one must first make a demand, either by check or otherwise,<sup>3</sup> while here the bank is immediately liable upon its own note if failing to honor it. Sometimes a bank issues certificates made payable on time, instead of on demand. But, whether made payable on time or on demand, certificates of deposit are

<sup>1</sup> See 2 Pars. Notes and Bills, 108, 109; *Birkhead v. Brown*, 5 Hill, 634; *Orr v. Union Bank of Scotland*, 1 H. Ld. Cas. 513; *Lonsdale v. Lafayette Bank*, 18 Ohio, 126; *Carnegie v. Morrison*, 2 Met. 381; *Union Bank v. Coster*, 3 Comst. 203.

<sup>2</sup> *Poorman v. Mills*, 35 Cal. 118; *Payne v. Gardiner*, 29 N. Y. 146; *Hunt v. Divine*, 37 Ill. 137; *Vastine v. Wilding*, 45 Mo. 89.

<sup>3</sup> See *Payne v. Gardiner*, and *Hunt v. Divine*, *supra*.

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substantially promissory notes of the same description, and should be presented for payment, when due, in a corresponding manner ; though we should say that a certificate payable on demand ought not readily to be presumed overdue in a holder's hands, more than a bank check. The rule as to indorsement and the rights of indorsee or bearer appears to be essentially that of promissory notes.<sup>1</sup> If the holder of a certificate of deposit puts it into his own bank, the latter must honor his checks drawn against the fund ;<sup>2</sup> and by receiving and applying such certificate this bank acquires the rights of a *bonâ fide* holder against the bank which issued it.<sup>3</sup>

§ 474. **Coupon Bonds and their Negotiable Qualities; English Rule.** — IV. The manifest disposition of the present age to multiply the kinds of negotiable instruments in circulation is well illustrated in the history of "coupon bonds," — a kind of security which is now constantly found in the money market, being a great favorite with the capitalist, and eagerly offered by borrowers who wish to make their debts attractive; though before 1850 the name was scarcely known in our American legal circles. To borrow money on a personal bond conditioned for the repayment of the loan at some future date specified is no new thing; and additional security in the shape of a mortgage of real estate was frequently furnished by the obligor in the days of our ancestors. But how could securities of this sort pass about readily, at their market value, when assignment was attended with considerable formality, when the assignee was

<sup>1</sup> *Poorman v. Mills*, 35 Cal. 118. See *Phelps v. Town*, 14 Mich. 374. And consistently, too, one who takes such a certificate payable on demand unreasonably late after date takes it subject to the original equities. *Tripp v. Curtenius*, 36 Mich. 494. A certificate of deposit in the usual form, payable to order, renders an indorser liable as such. *Pardee v. Fish*, 60 N. Y. 265.

The mere possession of an undorsed certificate of deposit, naked and unexplained, is held not to afford

*primâ facie* proof of title, as against the payee therein named; this on a principle broad enough to include all negotiable paper whatever. *Vastine v. Wilding*, 45 Mo. 89, criticising statement in 2 Pars. Notes and Bills, 444.

<sup>2</sup> *Armstrong v. Am. Exch. Bank*, 133 U. S. 566.

<sup>3</sup> *Ib.* Goldsmiths by way of doing a banking business used to issue receipts for deposits after this manner. 2 Daniel, Neg. Instr. § 1693 a.

compelled to sue in the name of the original obligee, holding subject to the original equities, and when it was found an awkward matter for all parties to adjust interest payments, pending the maturity of the principal debt? The seal which distinguished a bond from a note was a legal obstruction to negotiability. As Mr. Parsons says, however, there has been a tendency on the part of courts and legislators, perhaps even more on that of the mercantile community, to extend some of the advantages of negotiable paper to other contracts and instruments.<sup>1</sup> And in 1811 when the Court of King's Bench in England expressed strong doubts whether the *bond fide* purchaser for value of East India Company bonds could be protected against a former owner, from whom they had been fraudulently obtained, upon the ground that they were not assignable at law, Parliament immediately interfered, and declared that such bonds should be assignable and transferable by delivery of the possession thereof.<sup>2</sup> The recognition of bonds in the negotiable form as negotiable instruments has since been largely, if not altogether, accomplished in the English courts, as appears [1870] from the latest important decisions on the subject.<sup>3</sup>

<sup>1</sup> See 2 Pars. Notes and Bills, 112.

<sup>2</sup> *Ib.* See *Glyn v. Baker*, 13 East, 510; 51 Geo. III. c. 64.

<sup>3</sup> In a decision rendered in 1870, a company had issued, as duly authorized by its memorandum of association, instruments described on their face as "debenture bonds," and stamped as bonds, and expressing that the company "bind themselves to pay the bearer the principal sum of £20." The words, with respect to the interest, were in similar form; and the instruments were sold in open market. The company being in course of winding up, it was admitted that the company had equities against the parties to whom the instruments were originally issued; and, on one side, it was claimed that these equities ought to be enforced against the holders, because the bonds

were not negotiable. But the Court held, upon full consideration of the case: 1st, That the instruments were promissory notes, or, if not promissory notes, at least negotiable instruments, and amounting to contracts to pay any one who might happen to be the bearer; 2d, That, consequently, holders for value without notice of the original equities were entitled to prove for the amount due, free from all such equities. *Imperial Land Co., In re*, L. R. 11 Eq. 478. "A case of the greatest possible importance." *Per* Malins, V. C. See former conflicting cases cited in this case; also, *City Bank, Ex parte*, L. R. 3 Ch. 758; *Brown v. London*, 13 C. B. n. s. 828; *Higgs v. Assam Tea Co.*, L. R. 4 Ex. 387. The negotiability of municipal and corporate bonds, in negotiable form, notwithstanding the seal,

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§ 475. **The Same Subject** — The so-called debentures in one of these latest cases had interest coupons annexed, though the question of the validity and effect of these coupons received no especial consideration from the court.<sup>1</sup> And a case decided by the Court of Queen's Bench much earlier turned upon the rights of parties to promissory notes dated in 1846, with interest coupons annexed.<sup>2</sup> Indeed, the use of these convenient interest coupons, or interest warrants, seems to have originated in Continental Europe; for the public securities of Prussia, Denmark, and other countries, which became marketable in England, bore this character certainly in 1820, if not earlier.<sup>3</sup>

§ 476. **Coupon Bonds and their Negotiable Qualities; American Rule.** — In our modern every-day life we find the coupon principle applied to railway tickets, and in a variety of other ways; and as to coupon bonds, government issues them, counties, cities, and towns issue them, the individual who mortgages his farm to a distant capitalist tenders them, and corporations, and especially railroad corporations, find them extremely serviceable in connection with placing their loans on the market. In our growing States, where vast transportation enterprises were projected (1825-1860), which called

is affirmed in the latest English cases. *Goodwin v. Roberts*, 1 App. Cas. 476; L. R. 10 Ex. 337.

The scrip of a foreign government issued by it on negotiating a loan (which scrip promises to give to the bearer, after all instalments have been duly paid, a bond for the amount with interest) is by the custom of the stock markets a negotiable instrument and passes by mere delivery to a *bonâ fide* holder for value, after the usual rule of negotiable instruments. *Goodwin v. Roberts*, 1 App. Cas. 476. When the instalments mentioned in the scrip have actually been paid, the scrip is as much a symbol of money due, and as capable of passing by delivery, as the bond itself would be. *Ib.*, Lord Selborne. See further, on this point.

*Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

<sup>1</sup> *Imperial Land Co., In re*, L. R. 11 Eq. 478.

<sup>2</sup> *McLae v. Sutherland*, 3 E. & B. 1; 1 Smith Lead. Cas. 602 *et seq.*, *n.* to *Miller v. Race*, 1 Burr. 452.

<sup>3</sup> See *Attorney-General v. Bouwens*, 4 M. & W. 171. The word "coupon" itself betokens a Continental origin; the word *couper*, to cut, being suitably applied, in the present connection, to the many interest certificates annexed which must be severally presented for payment.

Sometimes foreign debentures are found objectionable to our public policy as a "lottery" contrivance, such as once prevailed in the loans of some of the United States. See 147 U.S. 449.

for expenditures beyond the means of the private citizens specially interested in them, it became a common thing for a legislature to lend the credit of the State to the new concern, or to authorize such counties and cities as were likely to be benefited to subscribe to the stock, and to issue its bonds in payment. Upon bonds of this latter description (which naturally enough were sometimes found a burden instead of a blessing) suits frequently arose; and it became in time well settled, by a series of decisions culminating in the Supreme Court of the United States, that bonds of municipal or other corporations which have been issued by lawful authority, with interest warrants or coupons annexed (or, indeed, without them, so long as they are of the ordinary kind, and are made payable to bearer), are commercial securities, and so far possess the usual qualities of negotiable paper that the *bond fide* holder purchasing before maturity has a full title irrespective of the equities unknown to him which might have availed against the original payee. And coupons, too, if suitably expressed as payable to bearer, and separable from the bond, are, as it is settled, to a like extent negotiable instruments, so that the holder may sue on them without producing or being interested in the bonds. "These securities are found," as Mr. Justice Swayne recently observes,<sup>1</sup> "in the channels of commerce everywhere, and their volume is constantly increasing."<sup>2</sup>

<sup>1</sup> *Murray v. Lardner*, 2 Wall. 110 (1864).

<sup>2</sup> *Ib.*; *Thomson v. Lee County*, 3 Wall. 330. And see *Mercer County v. Hackett*, 1 Wall. 95; *Gelpcke v. Dubuque*, 1 Wall. 175; *Clark v. Iowa City*, 20 Wall. 583; *Vermilye v. Adams Exp. Co.*, 21 Wall. 138; *Haven v. Grand Junction R.*, 109 Mass. 88; *Welch v. Sage*, 47 N. Y. 143; *Morris Canal v. Fisher*, 1 Stockt. 667; *Clark v. Janesville*, 10 Wis. 136; 1 Am. Lead. Cas. 5th ed. Hare & Wall. n., 406, 408; *Aurora v. West*, 22 Ind. 88. Also see cases cited in note, *infra*.

The latest American authorities

affirm the rule of the text as to corporate bonds generally; e.g. those of railways, and the coupons annexed. *Evertson v. National Bank*, 66 N. Y. 14; *Hotchkiss v. National Bank*, 21 Wall. 138. The detached coupons may circulate after the bonds themselves have been paid. *National Bank v. Hartford R.*, 8 R. I. 375. A coupon once detached and negotiated ceases to be a mere incident of the bond. *Ib.* Negotiable coupons are entitled to days of grace. 66 N. Y. 14. But if interest coupons or warrants are not negotiable in form, they are not negotiable when separated



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§ 477. **The Same Subject.**—So universal, indeed, has the use of coupon bonds become at the present day, that many other interesting doctrines concerning the legal *status* of parties to these securities must soon inevitably come before the courts; and in this country, certainly, questions of this character are sure to receive such a liberal interpretation as may protect the rights of parties who have fairly and honestly invested in this kind of property. But, notwithstanding the expressions of many eminent jurists touching the general negotiable characteristics of coupon bonds, we apprehend that it is as yet premature to say they are negotiable instruments in the same full sense that bills, notes, and checks are; to say that they are not rather of a *quasi*-negotiable character, negotiable under certain aspects and for certain purposes only. Securities of this character, so far as they sell in the market, are almost always, if not invariably, made payable “to bearer,” instead of “to order;” or else are registered. The law of indorsement pertaining to them is still undeveloped; and indorsement when made upon them is rather in connection with the formalities of transfer than for assuming an indorser’s liability. It is true that coupons have usually the form of a promissory note; and so is the principal obligation sometimes;<sup>1</sup> but when a surety obligation is added, it is usually indorsed upon the instrument in the form of a specific guaranty. Thus far,

from the bond, although the latter be negotiable; hence the purchaser takes them subject to all defects of title. *Evertson v. National Bank*, 66 N. Y. 14.

“Sealed notes” are in some States, contrary to the old rule, given, by legislative enactment, the usual consequences of negotiability. 17 W. Va. 779; 85 N. C. 166. See, as to the alteration of a sealed note, *Neff v. Horner*, 63 Penn. St. 327.

<sup>1</sup> Individual mortgage notes in many States have coupon warrants for interest attached. See § 256. Coupon bonds expressed in negotia-

ble words carry the essential qualities of negotiability like bills and promissory notes; while, if no negotiable words are expressed, the instrument is not negotiable. *Daniel Neg. Instr.* § 1500, and numerous State decisions cited; *Thomson v. Lee County*, 3 Wall. 327. So much has been decided since the first edition of this work as an American doctrine. The English courts have not so clearly settled the point. § 475; *Daniel*, § 1504. But rules of indorsement, as applicable to commercial paper, have not been developed.

the current of decisions sets chiefly towards the determination : *first*, of the right which some municipal or private corporation had to issue the coupon bond at all ; and, *second*, of the extent to which a *bond fide* holder for value taking as bearer, and not as indorsee, shall be protected against equities which may have existed between the original parties.<sup>1</sup>

<sup>1</sup> As to the first of these propositions, the right of a State legislature to authorize municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly, is settled on construction, in a number of instances. See *Gelpcke v. Dubuque*, 1 Wall. 175 ; *State v. Wapello*, 13 Iowa, 388 ; *Amey v. Allegheny City*, 24 How. 384. And the statute may confer its authority by implication. *Gelpcke v. Dubuque*, *supra* ; *Meyer v. Muscatine*, 1 Wall. 384. But county bonds are invalid, though in the hands of an innocent purchaser, when issued in one way illegally, when the statute declared that they should be issued in another and different way. *Marsh v. Fulton County*, 10 Wall. 676. And when municipal bonds bear a reference upon their face to the authority under which they are issued, third persons are bound to take notice of such authority and its extent. *Aurora v. West*, 22 Ind. 88 ; *McClure v. Oxford*, 94 U. S. 429. But a new statute may operate as a ratification of bonds and cure all defects and irregularities of the issue. *Beloit v. Morgan*, 7 Wall. 619 ; *Campbell v. Kenosha*, 5 Wall. 194. And see *Butler v. Dubois*, 29 Ill. 105 ; *Johnson Co. v. January*, 94 U. S. 202 ; 97 U. S. 83. There are numerous cases of construction as to the act or charter authorizing the issue of bonds ; as, for instance, *Seybert v. Pittsburg*, 1 Wall. 272 ; *Hopple v. Brown*, 13 Ohio St. 311 ; *Amey v. Allegheny City*, 24 How. 384 ; *Mitchell v. Burlington*, 4 Wall. 270. The

question is sometimes as to the authority of particular officials to issue the bonds. See *Curtis v. Butler*, 24 How. 436 ; *Marshall County v. Cook*, 38 Ill. 44 ; *Berliner v. Waterloo*, 14 Wis. 378. Bonds of municipal corporations require statute authority ; the power to borrow money on municipal credit does not imply the power to issue such negotiable instruments ; and provisions of the statute which authorizes must be strictly pursued. *Barnett v. Denison*, 145 U. S. 135 ; 132 U. S. 340 ; 134 U. S. 198 ; 144 U. S. 173. But express power to issue interest-bearing bonds, implies power to attach coupons. 148 U. S. 591. If submission to voters is a prerequisite, that submission should be made. See *Foote v. Salem*, 14 Allen, 87 ; also *Warren Co. v. Marcy*, 97 U. S. 96 ; *American Life Ins. Co. v. Bruce*, 105 U. S. 328 ; 105 U. S. 342 ; 105 U. S. 739 ; *Hannibal v. Fauntleroy*, 105 U. S. 408. But the *bond fide* holder's right is favored, nevertheless, where such bonds recite full conformity with statute requirements. And it seems always inequitable that a municipal government should be paid the money *bond fide* which it has sought to raise, and after applying it as desired repudiate its bonds and escape *in toto* all obligation to refund the money. The authority to issue "bonds" does not restrict such issue to the old common-law and unnegotiable bonds. *Woods v. Lawrence County*, 1 Black, 386. Power of the corporation to issue being shown, it would appear that the want of a proper execution of that power cannot be set up against a *bond*

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§ 478. **Government Loans; Notes, Bonds, etc.**—But the subject of coupon bonds brings us very closely to that of

*fide* holder. *Rogers v. Burlington*, 3 Wall. 654; *County of Henry v. Nicolay*, 95 U. S. 619. And see *Supervisors v. Schenck*, 5 Wall. 772. The effect of recitals in the bond, of official certificate, of estoppel or ratification, may be often worth considering in all such cases. Bondholders may be deemed holders for value although taking bonds in security or as payment for pre-existing indebtedness. 134 U. S. 150. It seems to matter little whether the so-called "bonds" issued by a municipal corporation are under seal or not. *People v. Mead*, 24 N. Y. 114. On the whole it may be said that a substantial compliance with the statute, as to amount, for instance, where the amount is clearly limited, is necessary. See *State v. Saline County Court*, 45 Mo. 242. But immaterial misstatements in bonds do not affect their validity. *Gould v. Sterling*, 23 N. Y. 439. As to a proviso in charter that bonds "shall not be sold at less than par," see *Woods v. Lawrence County*, 1 Black, 386. And bonds being issued to *bona fide* holders, which under the State decisions are valid at the time of issue, they cannot be invalidated by subsequent decisions of the State. *City v. Lamson*, 9 Wall. 477. If *de facto* officers execute the bonds, the question of office *de jure* cannot be set up against the *bona fide* holder. 105 U. S. 728. As to stipulations declaring the bonds convertible, see 28 Ohio St. 108. As to stipulations for a default making the principal payable, see 58 Ga. 584. Where bonds are regular on their face it is no defence against a *bona fide* holder without notice, that the corporation issuing the bonds was not organized in due form; nor can irregularity or even fraud in issuing them be set up. *Macon Co. v. Shores*, 97 U. S. 272;

98 U. S. 308; 104 U. S. 579. The absence of a seal to the bond, the bonds themselves being duly authorized and otherwise properly issued, does not affect the *bona fide* holder's right to recover. *Draper v. Springfield*, 104 U. S. 501. Formal prerequisites are not essentials, as concerns such holder. 105 U. S. 739.

Detached coupons may be sued on when due, as an independent cause of action. *National Bank v. Hartford R.*, 8 R. I. 375; *Evertson v. National Bank*, 66 N. Y. 14; *Cicero v. Clifford*, 63 Ind. 191; *Union Trust Co. v. Monticello Co.*, 63 N. Y. 311; 94 U. S. 801. If interest coupons refer to the bonds to which they were attached, the purchaser is charged with notice of what the bonds contain. *McClure v. Oxford*, 94 U. S. 429; 27 Gratt. 119. An unpaid and overdue coupon does not so dishonor the whole bond as to deprive a buyer of the character of a purchaser before maturity. *Cromwell v. Sac County*, 96 U. S. 51. Delivery of interest coupons implies no guaranty that they will be paid. 96 U. S. 659.

Purchaser held to be affected with notice of their invalidity where an express provision for an indorsement was not complied with, and there was uncertainty in the amount and place of payment. *Parsons v. Jackson*, 99 U. S. 434. But where, consistently with its tenor, the bond is indorsed by an officer "to bearer," a purchaser has the right to sue as holder. *Wilson Co. v. Nashville Bank*, 103 U. S. 770. See further, *Maas v. Kansas R.*, 83 N. Y. 223. For application of the rule of *bona fide* holder to a bond whose indorsement was erased and a new one forged, see *Colson v. Arnot*, 57 N. Y. 253; 28 N. J. Eq. 403. Bonds may be invalid as between the original parties, and yet

government loans, State or national ; and that of government loans takes us to the extreme limit of incorporeal chattels ; to that point where it becomes extremely difficult to distin-

available to the *bonâ fide* holder. *Stewart v. Lansing*, 104 U. S. 515.

As to the second proposition of the text, see cases in note *supra*, to the effect that a *bonâ fide* purchaser before maturity holds, as in the case of bills and notes, free from the original equities. And see *Moran v. Commissioners*, 2 Black, 722 ; *Society for Savings v. New London*, 29 Conn. 174 ; *People v. Mead*, 24 N. Y. 114. But it appears that, if taken when overdue, they are subject to such equities, following the usual rule. See *Texas v. White*, 7 Wall. 700 ; *Arents v. Commonwealth*, 18 Gratt. 750. Making the bonds payable to bearer on their face amounts to a direction that they shall be transferable by delivery, like bills and notes. *Commonwealth v. Commissioners*, 37 Penn. St. 237. Purchaser is not bound to see how the money he pays is applied. *Mills v. Gleason*, 11 Wis. 495. Coupons are transferable by delivery, and the holder may sue in his own name. *Thomson v. Lee County*, 3 Wall. 330 ; *Johnson v. Stark*, 24 Ill. 75 ; *Clark v. Janesville*, 10 Wis. 136. One who receives the coupons after they are stolen, and sells and turns them into money, only as an agent, and without deriving any benefit to himself, cannot be sued for their conversion. *Spooner v. Holmes*, 102 Mass. 503.

Defendant having shown strong circumstances of fraud in the origin of a negotiable security, the holder must show that he gave value before maturity. *Smith v. Sac County*, 11 Wall. 139. Concerning the application of the Statute of Limitations to suits on coupons detached from the bond, see *City v. Lamson*, 9 Wall. 477. And see *Beaver v. Armstrong*,

44 Penn. St. 63 ; *Welsh v. St. Paul R.*, 25 Minn. 314.

Since the first edition of this work was issued, there have been many decisions rendered on the subject of municipal and corporate bonds. An exhaustive presentation of the State decisions on the subject in a work of the present compass would be impossible ; but as the Supreme Court of the United States has lately passed upon many of these questions it has been thought desirable to refer the reader to their detailed examination.

The decisions since the second edition of this work seem to put the *bonâ fide* holder to considerable risk as to municipal securities. He must take the risk of the official character of those executing them. 131 U. S. 162. He must be without notice of infirmity when he pays over. 147 U. S. 59. If he buys bonds in litigation or where they are offered at an immense depreciation he takes the risk of one affected by notice. 132 U. S. 107 ; 147 U. S. 59. Even a *bonâ fide* holder cannot recover upon bonds or coupons where there was no authority to issue them. *Brenham v. German American Bank*, 144 U. S. 173. He is chargeable with notice of the requirements of the law under which they were issued ; he is bound to take notice of constitutional limitations on the municipal indebtedness ; and he is bound by information open to him in the official records of the officers signing the bonds. 145 U. S. 135 ; 142 U. S. 355 ; 144 U. S. 610 ; 119 U. S. 215. But as to no notice of restriction upon issue by a contract see 134 U. S. 150. And legislative and executive notice that requirements are fulfilled or a certificate of registry may avail him. 133

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guish the incorporeal "money right" from the corporeal "money." Our loan laws are for the most part public contracts for the temporary exigencies of the government, and constitute a series of isolated financial expedients with few permanent or general features. From the very nature of the case they receive but little attention in the courts; and redress, if hardship is suffered, must be found in legislation.<sup>1</sup> Since the adoption of our Constitution, the usual evidences of the public debt have been distinguished as bonds and notes. But one form of obligation is doubtless regarded as solemn and binding upon the government no less than the other; though it might be thought that the bonds constitute, technically speaking, a preferred claim. In either case the seal of the Treasury Department is affixed. The practical difference seems to have generally been that, whereas the treasury notes are issued for short periods,—from one to three years,—and then funded, cancelled, or, if necessary, reissued, the bonds are issued for longer periods, and possess, in theory at least, all the advantages of a permanent investment.

Formerly treasury notes were in comparatively small sums, for the most part, and passed readily from hand to hand. Government bonds, on the contrary, were issued for large amounts, and could only be transferred by assignment on the books of the Department. The former were better adapted for circulation; the latter could be held with greater safety. But the "coupon" principle has of late years been applied quite liberally to our loans both State and Federal, as they are likewise in England and Continental Europe, and indeed in most civilized countries of the present day, whose rulers appear as borrowers in the world's great money market; and whether the loan take the shape of bonds or promissory notes, interest coupons or warrants are usually annexed.<sup>2</sup> Making

U. S. 198; 149 U. S. 122. Wrongful disposition of the proceeds of borrowed money cannot be set up against the *bonâ fide* investor. 149 U. S. 22.

See, further, note at close of this chapter.

<sup>1</sup> See author's article on "Government Loans," 3 Am. Law Rev. 218 *et seq.*

<sup>2</sup> The characteristics of the long loans of the United States are now greatly changed; and those who

allowance for the limited remedies which pertain to rights against government, as compared with those applicable to individuals and private or municipal corporations, it is safe to assert that the holder of government coupon bonds or government notes payable to bearer and not yet due has the same privileges as the holder of other commercial negotiable securities of a corresponding character. And it has been held, moreover, conformably to the rules of negotiable securities, that government bonds payable to bearer, which are purchased considerably later than the date at which they were redeemable, and at a depreciated value, are subject to defects of title in the party to whom they were first issued.<sup>1</sup> Coupons of a government bond are negotiable if suitably expressed.<sup>2</sup>

§ 479. *Registered Bonds distinguished from Coupon Bonds.*—To get rid of some of the disadvantages attending the use of coupon bonds, or rather to secure certain advantages which they cannot readily supply, inasmuch as indorsement is undesirable, railroads and other corporations sometimes adopt a plan of “registering,” as it is called, the bonds at any holder’s option, so that negotiability may be created or

compare the “five-twenty” and “seven-thirty” loans of the civil war (1861–65)—the one consisting nominally of bonds and the other of notes, and both issued originally as popular loans in small denominations—will perceive that there is little difference between them, so far as amount of certificate is concerned; and still less in respect to negotiable convenience. *Ib.*

<sup>1</sup> *Texas v. White*, 7 Wall. 700. And see *Gorgier v. Mieville*, 3 B. & C. 45; *Brandao v. Barnett*, 12 Cl. & Fin. 787. And as to that form of public loan known as the “certificate of indebtedness,” see *Banks v. Mayor*, 7 Wall. 16. See also, as to certain State bonds, *Hartman v. Greenhow*, 102 U. S. 672. Treasury notes of the United States convertible into government bonds at a definite future time follow the rules of nego-

tiable paper as to title taken before or after maturity. *Vermilye v. Adams Express Co.*, 21 Wall. 138.

<sup>2</sup> *Spooner v. Holmes*, 102 Mass. 503.

Certain State bonds, though fraudulently issued, were sold in a foreign market. Owners were treated under the circumstances as purchasers for value. *Florida Central R. v. Schutte*, 103 U. S. 118. As to “impairing the obligation of contracts” by a State in such connection, see *Bier v. McGehee*, 148 U. S. 137. And as to “tax receivable” coupons under a State law, see *McGahey v. Virginia*, 135 U. S. 662. A purchaser of State bonds with knowledge of their illegal issue, or of long dishonor by non-payment of interest, acquires no title which he can enforce as *bond fide* holder. *Trask v. Jacksonville R.*, 124 U. S. 615.

destroyed by the *bond fide* holder at pleasure.<sup>1</sup> And "registered bonds," formerly the usual kind of long government loans from individuals, are still to be found; these are purchased by persons who prefer to guard against loss of their securities, and do not mean to change their investments frequently; and any assignment of the instrument must be recorded on the books of the treasury, interest being drawn only by the registered owner or his attorney duly authorized.<sup>2</sup> The registry system of private corporations which issue bonds and borrow on a large scale is similarly conducted.

## CHAPTER IX.

### SHARES OF STOCK.

§ 480. **Shares in Joint-Stock or Business Corporations; Division of Present Chapter; Capital is largely invested in Business Corporations.** — Shares in incorporated companies constitute at this day a very important species of personal property; and

<sup>1</sup> See Am. Lead. Cas. 5th ed. 408, 409, where this plan is fully set forth. Mr. Wallace, in the same connection, says wisely that while the owner of coupons may sue on them, detached from the bond, such things as coupons, far from maturity, "are so seldom or never dealt in when in a form detached from their proper bonds, that a purchaser of *them* would, in case of a loss or robbery from a true owner, hardly be treated with the favor due to a holder of ordinary negotiable paper, or of coupon bonds with the coupons annexed." Am. Lead. Cas. ib. 408. But see *National Bank v. Hartford R.*, 8 R. I. 375; *Evertson v. National Bank*, 66 N. Y. 14. The tendency of the latest cases is to regard detached coupons as usually negotiable.

As to whether a certificate of stock may ever be considered a negotiable instrument, see next chapter.

<sup>2</sup> The permissive registry of a bond payable to bearer does not of itself make the bond non-negotiable. *Savannah R. v. Lancaster*, 62 Ala. 555. As to government liability for cancelled registry bonds, see 148 U. S. 573.

The law of various kinds of *quasi-negotiable* chattels has much developed during the past ten years and since the foregoing chapter was originally prepared. As to checks, the reader is referred to the works on Bills and Notes mentioned at the close of the preceding chapter. Bills of lading receive treatment in *Schoul. Bailments*, under the head of "Carriers;" also in the latest editions of *Angell, Redfield*, and others, on Rail-

in our own country, where joint-stock corporations are rapidly multiplying, there are very few wealthy persons who do not invest some of their surplus riches in corporation stock; such investments yielding a handsome profit, or else melting away altogether, according to the good standing of the corporation and the nature of its transactions. For investing in a company chartered and organized for the business of banking, insurance, railway transportation, or some sort of manufacture, we embark with others in that particular business, and go into trade somewhat as partners, though (subject to the law of corporations) with a more restricted liability and a less extensive control over the affairs of the concern.

Of the nature and organization of business corporations we have spoken in a former chapter: it now remains to discourse of the capital stock of such corporations. And we shall find it convenient to consider, at the present time, *first*, what is the nature of stock; *second*, how one becomes a stockholder; *third*, what are the rights of a stockholder; and *fourth*, what are his liabilities.<sup>1</sup>

§ 481. **Nature of Stock considered; Capital Stock.** — *First*, as to the nature of stock. The word "stock" is sometimes applied to the trading capital of persons engaged in a partnership business, and in a sense similar to the present. For as each partner usually gives something valuable to the com-

ways and other Carriers. As to coupon bonds, &c., Dillon on Municipal Corporations, and Jones on Railroad Securities will be found valuable for reference. And see John W. Daniel on Negotiable Instruments, a work whose proper scope best embraces all instruments considered in this and the preceding chapter. The latest text-books or latest editions should be consulted upon all these topics; for, as regards this chapter at all events, the most important development of the law has been that of the past ten or fifteen years, and leading principles are scarcely yet settled.

<sup>1</sup> It is not every corporation which

offers shares in its capital stock for investment; for instance, a city, though a corporation, is not a "joint-stock corporation." A "joint-stock corporation" should not be confounded with the strict "joint-stock company." See *supra*, §§ 201-204. But by the former term we usually designate a corporation which is chartered and organized for certain business purposes, and with the view of having the profits of that business divided among those holding the corporation stock in proportion to their respective shares. Ang. & Ames, § 556; Field Priv. Corp. § 123. And sometimes the style "business corporation" will be found preferable.



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mon concern which goes towards making up the aggregate capital, whether his contribution consist in goods or money, so, in a joint-stock corporation, each person who becomes a shareholder contributes in effect the nominal amount represented by his shares towards the capital of the corporation, which capital constitutes the fund for employment in the corporate business. "Capital stock" is the term frequently used in our present connection; and this capital stock is computed as so much money, constituting a certain sum which is divided into a number of shares. The stock is raised by the mutual subscription of the members of the corporation in the first instance, though the stockholders or shareholders in a corporation may be constantly changing afterwards through the transfer of stock or otherwise. And the corporation capital is divided into shares, the holders of which are entitled to a corresponding proportionate part of the profits of the corporate business, and are subject to assessment in the same proportion.<sup>1</sup> But while the word "stock" is usually applied to the capital of a corporation, it sometimes refers more especially to the interests of individual shareholders therein.<sup>2</sup>

As a corporation is limited in its powers by the organic act or charter which gave it existence, we may usually ascertain the extent of the capital stock which any joint-stock corporation is authorized to raise by examining such act or charter; and the same can be said as to the number of shares into which the capital stock is divided. But if a charter, instead of fixing the number of shares, provides that there shall not be less than a certain number, nor more than another number, the company may determine the number within the limits prescribed;<sup>3</sup> and so correspondingly, with charter provisions concerning the amount of the capital

<sup>1</sup> See Ang. & Ames Corp. cs. 15, 16; Bouv. Dict. "Stock;" and chapter on Corporations, *supra*. By "capital stock" we do not usually refer to the property of the corporation, to its "plant" so called, but to the amount contributed by the stockhold-

ers as members. *State v. Morristown Association*, 23 N. J. L. 195.

<sup>2</sup> *People v. Commissioners of Taxes*, 23 N. Y. 192.

<sup>3</sup> *Somerset R. R. Co. v. Cushing*, 45 Maine, 524.

stock. Shares usually represent money contributions in a modern business corporation; but where the charter authorizes capital stock to be paid for in property, and the shareholders in good faith contribute property, instead of money, by way of subscription, third parties have no ground of complaint.<sup>1</sup>

§ 482. **The Same Subject; Shares are Incorporeal Personal Property.** — Previous to the nineteenth century, corporations were rarely chartered, and questions concerning the nature of stock seldom arose in the courts. When canal, turnpike, and other companies, whose profits arose out of transactions connected with land, first began to be created, there was no little disposition to treat their stock as real estate; but at the present day the universal preference is to regard all corporation stock in the hands of stockholders as personal property. Often there are general statutes found to this effect; and it has been not an unusual thing for an act of incorporation to use such special expression as to remove all doubt on the subject. Thus, in England, the nature and incidents of shares in the joint-stock companies incorporated by letters-patent or act of Parliament have generally been designated in their respective charters or acts of incorporation, which at the present day always declare the shares to be personal estate, and so transmissible.<sup>2</sup> The shares in some of the early American corporations were by statute made real estate, as in the instance of the Cape Sable Company in Maryland. But shares in the modern railroad companies appear to have always been treated as personal property, even where the charter was silent, conformably to the later English and American rule that shares in incorporated companies holding land for the purposes of their business must be considered personal property, unless the organic act or charter expressly declares otherwise.<sup>3</sup> As for manufacturing, banking, and insurance corporations, whose business is primarily

<sup>1</sup> *Fort Madison Bank v. Alden*, 129 U. S. 372.

<sup>2</sup> *Wms. Pers. Prop.* 5th Eng. ed.

183-192; *Drybutter v. Bartholomew*, 2 P. Wms. 127.

<sup>3</sup> *Abb. Dig. Corp.* 736; *Cape Sable Company's Case*, 3 Bland Ch. 606.

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with personal property, there was far less reason why their stock should ever be regarded as real estate.<sup>1</sup>

In fact, as to every joint-stock corporation, the shares in a shareholder's hands entitle him to a proportionate part in a capital which is regarded as so much money; and his right is a money right so far as himself is concerned, even though that capital, with reference to the fictitious personage known as the corporation, be invested in real estate, or in goods and chattels, or, what is quite commonly the case, in both together, for the purposes of the corporate business.<sup>2</sup> For this reason the lands of a corporation may be taxed as real estate, while its stock is personal property; and according to the modern doctrine, while a corporation may own a great deal of real and a great deal of personal property, the interest of each individual shareholder is a share of the net produce of both when brought into one fund, by way of capital assets.

Shares in corporation stock being regarded therefore as personal property, they are to be classed with incorporeal personal property, or, as it is sometimes said, they are of the nature of *choses in action*; for the certificate of stock is merely corporeal evidence of the incorporeal right, and a muniment of title, as in the case of bills and notes; while shares of stock as a rule differ from bills and notes in being non-negotiable, or rather assignable instruments, as will be seen when we come to consider the method of their transfer.<sup>3</sup>

§ 483. **Dividends upon Stock; their Nature.** — To that portion of the principal or profits (usually the latter) which the corporation, by its officers, divides among the stockholders on some periodical computation, we apply usually the term of *dividend*.<sup>4</sup> Until a dividend is regularly declared, and thus

<sup>1</sup> Ang. & Ames, § 557; Bouv. Dict. "Stock;" Edwards v. Hall, 6 De G. M. & G. 74; Tippetts v. Walker, 4 Mass. 595. *Contra*, Welles v. Cowles, 2 Conn. 567.

<sup>2</sup> *Ib.*; Rex v. Hull Dock Co., 1 T. R. 219; Bradley v. Holdsworth, 3 M. & W. 422.

<sup>3</sup> See Rex v. Capper, 5 Price, 217;

Arnold v. Ruggles, 1 R. I. 165; Allen v. Pegram, 18 Iowa, 163; Sewall v. Boston Water Power Co., 4 Allen, 282; Ang. & Ames, 8th ed. § 560; Mechanics' Bank v. New York R. R. Co., 3 Kern. 599; Union Bank of Tennessee v. State, 9 Yerg. 490; Field Corp. § 133.

<sup>4</sup> The ultimate object of an ordi-

separated from the bulk of the capital stock, all profits and surplus funds of the corporation continue by their accumulation part of the capital itself. But a dividend which has been regularly declared, and is already payable, should be deemed not only incorporeal personal property (or a *chose in action*) but an unpaid debt due from the corporation to the individual stockholder, until he has drawn or appropriated it to himself.<sup>1</sup> The right of the party to whom the dividend is payable is a separate and independent right, which may be enforced as against the corporation, notwithstanding his character of stockholder.<sup>2</sup>

§ 484. **Stock, as distinguished from the Corporate Property.** — The nature of the stock of a company, and the rights and liabilities of the corporation concerning it, may depend greatly upon the organization of the concern: whether, for instance, the charter is a peculiar one; or whether, again, the capital stock is that of a full corporation, or that only of a joint-stock company. The rule is that, if an unincorporated company or a firm purchase property, each individual shareholder has an immediate interest in it; but that the moment a company becomes a legal corporation, the corporation, upon being invested with the legal title, has that property in trust for the individual members, — or, in other words, for the stockholders.<sup>3</sup> And hence, no stockholder as an individual, nor even a single person who owns all the capital stock, can separately act for the corporation or sue as legal owner of its property.<sup>4</sup>

§ 485. **Over-issue of Stock; Partially-paid-in Capital, etc.** — A corporation, whose capital is limited by its charter, either

nary business corporation is the pecuniary profit of its individual members. *Morawetz Priv. Corp.* 644; *West Chester R. v. Jackson*, 77 Penn. St. 321; *Morawetz Priv. Corp.* § 351.

§ 344. This does not apply to a savings bank. *Huntington v. Savings Bank*, 96 U. S. 388. Dividends, of course, are personal property. 4

*Mass.* 595. <sup>1</sup> *Phelps v. Farmers' &c. Bank*, 26 Conn. 269; *King v. Paterson R. R. Co.*, 29 N. J. L. (Dutch.) 82, 504; *Wilkinson v. Charlesworth*, 11 Jur.

644; *West Chester R. v. Jackson*, 77 Penn. St. 321; *Morawetz Priv. Corp.* § 351.

<sup>2</sup> *Ib.*; *Ang. & Ames*, § 561; *Taylor*, §§ 568, 750; § 510, *post*.

<sup>3</sup> *Wordsworth's Joint-Stock Companies*, 288; *Ang. & Ames*, § 559; *Regina v. Arnaud*, 9 Q. B. 806; *supra*, § 231.

<sup>4</sup> *Button v. Hoffman*, 61 Wis. 20; *England v. Dearborn*, 141 Mass. 590; *Taylor*, § 187.

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in amount or the number of shares, cannot issue valid certificates in excess of this limit.<sup>1</sup> Nor can the price of shares fixed by charter be disregarded.<sup>2</sup> And it appears that any *bond fide* holder of stock certificates which are spurious, because a fraudulent over-issue, can sue the parties who made the over-issue, although his purchase was from other persons;<sup>3</sup> and so with other fraud in issuing the certificates.<sup>4</sup> As a general rule, a corporation cannot change the amount of its capital as prescribed in its charter; and all attempts to do so are void.<sup>5</sup> The stock thus created is void and the attempt to increase it is *ultra vires*; and the holder of such certificates has none of the rights and is subject to none of the liabilities of a holder of authorized stock.<sup>6</sup> And while a stockholder may be estopped to set up informalities in the issue of stock which the corporation had legal authority to create,<sup>7</sup> the nullity of unauthorized stock may be alleged by its holder.<sup>8</sup>

But when a corporation is created with a defined capital, which has been only partially paid in, the directors may afterwards receive subscriptions and issue certificates for the balance, entitling the holders to all the rights of the original stockholders. Nor have the original stockholders any prior right of subscription to these shares.<sup>9</sup> In fact, where there are no legislative provisions to the contrary, it would appear

<sup>1</sup> *Bruff v. Mali*, 36 N. Y. 200; cases *post*; *Railway Co. v. Allerton*, 18 Wall. 233.

<sup>2</sup> *Sturges v. Stetson*, 1 Biss. 246.

<sup>3</sup> *Bruff v. Mali*, 36 N. Y. 200. He may recover from his vendor. *Arnold v. Ruggles*, 1 R. I. 165.

<sup>4</sup> *Field Corp.* § 126.

<sup>5</sup> *Mackley's Case*, L. R. 1 Ch. D. 247; *Stace's Case*, 4 Ch. App. 682 n.; *Mechanics' Bank v. N. Y. & N. H. R.*, 13 N. Y. 599; 34 N. Y. 30; *Railway Co. v. Allerton*, 18 Wall. 233.

<sup>6</sup> *Scovill v. Thayer*, 105 U. S. 143.

<sup>7</sup> *Upton v. Tribilcock*, 91 U. S. 45; 95 U. S. 665; 96 U. S. 328; *Taylor*, § 541.

<sup>8</sup> Such is the lately declared view

of the Supreme Court of the United States. See Mr. Justice Woods in *Scovill v. Thayer*, 105 U. S. 143; 118 U. S. 634. Over-issued stock reduces the value of the original stock, which thus becomes sometimes known as "watered stock;" — a term applied also to issues in a purchase largely in excess of a true valuation. Generally by an over-issue a fraud is committed upon such stockholders as have not assented. *Field Corp.* § 144. If such over-issue is fraudulent and *ultra vires*, *semble* the corporation is not bound by the agents' acts, but the agents themselves become liable for over-issued stock.

<sup>9</sup> *Curry v. Scott*, 54 Penn. St. 270.

that the corporation has the same power to dispose of its unsubscribed and properly issued capital stock as any ordinary owner, — paying debts with it, or exchanging it for labor or such other property as may be required for the corporate purposes; <sup>1</sup> provided that all this be done in good faith and upon sufficient consideration.<sup>2</sup>

§ 486. **Right of a Corporation to deal in its Own Stock.** — But the extent to which a corporation, by its managing officers, may employ the corporate funds in buying up its own stock, is a matter of some uncertainty. The practice of speculating in this manner certainly ought not to be encouraged; and there are some cases which regard such a playing of corporate funds from one hand into the other as a breach of trust.<sup>3</sup> But the rule is not so strict in most parts of this country as in England; and not only may a corporation lawfully take its own stock in pledge or as payment of some debt from necessity, but in the absence of special restrictions it is often permitted to purchase and own such shares to much the same effect as an individual stranger, holding them unextinguished and reissuing them; even by issuing new stock on a new subscription, or by dividing the shares *pro rata* among the remaining shareholders.<sup>4</sup> Even where a corporation may have been guilty of a breach of trust by thus speculating with the corporate property, a stockholder

<sup>1</sup> *Ib.*; Abb. Dig. Corp. 740. The right to issue capital stock not already taken is a corporate franchise, and the property thus held is in trust for the benefit of the corporators and should be disposed of accordingly and not by way of favoritism. *Field Corp.* § 124; *Reese v. Bank of Montgomery Co.*, 31 Penn. St. 78.

Stock certificates not spurious nor illegally issued may avail a *bonâ fide* holder for value, though the consideration, as between the corporation and the party to whom they were issued, should fail. *Savage v. Ball*, 17 N. J. Eq. 142. Cf. *Scovill v. Thayer*, 105 U. S. 143, cited *supra*.

<sup>2</sup> *Handley v. Stutz*, 139 U. S. 417;

*Fogg v. Blair*, 139 U. S. 118. But it cannot give away its stock, nor transfer it upon any simulated payment or dishonest device. *Ib.*

<sup>3</sup> *In re London, &c. Railway Co.*, 5 De Gex & S. 402; L. R. 5 Ch. 444; L. R. 7 Ch. 161; *Williams v. Savage Man. Co.*, 3 Md. Ch. 418.

<sup>4</sup> *Coleman v. Columbia Oil Co.*, 51 Penn. St. 74, and cases cited; Abb. Dig. 737; *City Bank v. Bruce*, 17 N. Y. 507; *Robison v. Beall*, 26 Ga. 17; *Vail v. Hamilton*, 85 N. Y. 453; 162 Mass. 148; *Taylor*, §§ 134-136. See *supra*, § 481. A corporation having stock not taken may issue certificates therefor, taking in payment its own bonds. *Lohman v. N. Y. R.*, 2 Sandf. 39.

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interested may affirm by his own action the misapplication of funds, so as to be debarred of a remedy.<sup>1</sup>

§ 487. **Risks of Investment in Stock; whether Trust Funds may be thus invested.**—There are two noteworthy risks incurred by those who invest in stock: one, that of the corporate business proving in practice unprofitable; the other, that of bad management of the corporate concerns. To invest in this manner is to put money into trade; and into a trade which, however safe in itself, may, through the want of judgment, skill, and fidelity in those having the management of affairs, prove disastrous; for a stock corporation's directors are usually difficult to control and difficult to hold accountable. Hence, investments in stock are hardly to be deemed equally safe with investments in the securities of some well-established government or in the notes of individuals secured by a first-class mortgage of real estate; for which reason trustees, by the old English rule, were not permitted to invest their funds in any such manner; and such is the positive rule in New York and Pennsylvania.<sup>2</sup>

But a more flexible rule applies in most parts of this country; and in Massachusetts a trustee is justified in investing in bank stocks, or in the shares of manufacturing and insurance corporations, or in the notes of individuals secured by such stocks and shares as collateral security.<sup>3</sup> With the growth of capital seeking investment on the one hand, and on the other the rapid increase of joint-stock corporations organized for a variety of purposes, the American tendency must constantly be towards a flexible rule. We have a number of public funds offered in the market at this day which are far less secure than the best species of corporation stock; and both kinds of investments are frequently offered at speculative rates, and sold in a similar manner. The real

<sup>1</sup> *Coleman v. Columbia Oil Co.*, 51 Penn. St. 74; *Taylor*, § 541. A bequest to a corporation of its own stock has been sustained as valid. *Rivanna Nav. Co. v. Dawson*, 3 Gratt. 19.

<sup>2</sup> *King v. Talbot*, 40 N. Y. 76;

*Howe v. Dartmouth*, 7 Ves. 150; *Worrell's Appeal*, 9 Penn. St. 508; *Perry Trusts*, §§ 455, 456.

<sup>3</sup> *Harvard College v. Amory*, 9 Pick. 446; *Lovell v. Minot*, 20 Pick. 116.

safety promised in any investment, in short, must depend greatly upon the facts concerning the particular stock or security.<sup>1</sup>

§ 488. **Methods by which One becomes a Stockholder; Subscription and Transfer.**—*Secondly*, we inquire how one becomes a stockholder. There are two methods open: one by being an original subscriber to the stock; the other by coming in afterwards under what is called the transfer of another's stock. In some kinds of corporations, membership is a sort of exclusive privilege. Such is peculiarly the case with societies incorporated for the promotion of some literary, scientific, benevolent, or social object; their charters and by-laws usually providing some special mode for filling vacancies by election, in order that personal fitness may be made a test of membership. But as to joint-stock corporations and companies generally which are organized for the pursuit of gain in some line of business, membership in the first instance is constituted by subscriptions towards the original capital stock, and afterwards by the transfer of shares, without any election on the part of the corporation itself.<sup>2</sup> To be sure, transfer books are kept by corporations of this character, whose records determine to a considerable extent who shall rightfully vote at the meetings, as in the case of an election of directors; yet one who is entitled to stock may compel the corporation to give him a proper certificate where it is refused.<sup>3</sup> And, in general, what distinguishes a joint-stock or business corporation from all others

<sup>1</sup> Such seems to be the principle more latterly regarded in England; for while in that country trustees were formerly obliged almost invariably to invest in the public funds, courts of chancery have been authorized by more recent acts of Parliament to order investments in various other securities; so that, at the present day, cash under the control of chancery may, in that country, be invested in bank stock and East India stock, as well as upon mortgage security. See Acts 22 & 23 Vict. c. 35;

23 & 24 Vict. c. 38; Perry Trusts, § 455, and cases cited.

<sup>2</sup> *Overseers v. Sears*, 22 Pick. 122; *In re Philadelphia Savings Institution*, 1 Whart. 461; Ang. & Ames, 8th ed. § 114. Some business corporations are so organized as to restrict changes of membership by reserving, as in case of a member's death, the right of the company to buy in the stock at a valuation.

<sup>3</sup> Ang. & Ames, §§ 113, 565; *Agricultural Bank v. Burr*, 24 Maine, 256.



is that the title of one's admission into the concern is either by subscribing to the undertaking or taking the place of an original subscriber. For in such a corporation, each stockholder, whether by purchase or original subscription, has the right unless restrained by the charter or articles of association, to sell and transfer his shares, and by doing so to introduce others into the concern in his stead.<sup>1</sup>

§ 489. **Subscription for Shares.**—A subscription for shares in the stock of a joint-stock corporation is a contract, and follows the ordinary rules which relate to a contract. There is a consideration for every such subscription, which the law will infer from the subscription itself and the rights and privileges of membership thereby conferred upon the subscriber; and this consideration is usually sufficient to enable the corporation to sue for the amount of the subscription.<sup>2</sup> It is true that there may have been terms and conditions set forth in the subscription paper sufficient to negative the presumption of a promise to pay on the subscriber's part; but subscription contracts are not very strictly construed in matters of form, an intent to subscribe being capable of quite simple manifestation; and it is only necessary, as a rule, that the writing should indicate the subscriber's intention to become a stockholder and the number of shares to be taken by him; for the promise to pay for the stock is implied under these circumstances, and no express promise is necessary.<sup>3</sup>

<sup>1</sup> *Morgan v. Struthers*, 131 U. S. 246.

<sup>2</sup> *Ang. & Ames*, 8th ed. §§ 517-519, and cases cited; *Wordsworth's Joint-Stock Cos.*, 317; *Birmingham R. R. Co. v. White*, 1 Q. B. 282; *Small v. Herkimer Manuf. Co.*, 2 Comst. 330; *Abb. Dig.* 783, 801.

<sup>3</sup> *Ib.*; *Kennebec, &c. R. R. Co. v. Jarvis*, 34 Maine, 360. See *Phillips Limerick Academy v. Davis*, 11 Mass. 113. If subscription papers refer to the charter of the company, the subscription should be construed as if all the statute provisions affecting the subscriber's liability or his title to the

stock which he purchases were part of his agreement. *Small v. Herkimer Manuf. Co.*, 2 Comst. 330; *Abb. Dig. Corp.* 788. A subscription to the full amount named as the capital stock of the corporation is not a condition precedent to the right of recovery from any subscriber. *Abb. Dig. Corp.* 787; *Hoagland v. Cincinnati, &c. R. Co.*, 18 Ind. 452; *Schenectady, &c. Plank Road Co. v. Thatcher*, 1 Kern. 102. But where a given amount is required to be subscribed before the corporation can go into operation, there is no right to recover subscriptions before that amount is fully sub-

It appears to be a rule that if one who subscribes for stock and receives it has not paid up his subscription in full, he owes for the balance, but is, notwithstanding, a stockholder; that is to say, that the mere failure on his part to settle what he owes will not detract from his legal rights and liabilities.<sup>1</sup> The subscription is a good consideration for a note given in payment for the stock, and for a mortgage given to secure that note likewise; and in the United States this principle is quite liberally extended. For it is held in a number of cases that a corporation may enter into transactions of this sort, and may even give its stock in payment of land, labor, or materials, where there is no express prohibition to the contrary affecting its charter.<sup>2</sup> And it is further held that if the subscriber to stock whose subscription was upon the understanding that a certain amount should be paid in materials refuses so to pay, his subscription may be demanded in money.<sup>3</sup> Not uncommonly we find subscription papers drawn up so as to make the capital subscribed for payable in instalments. This is quite convenient to all parties where the proposed business may be conducted profitably on a minimum cash capital and extended gradually afterwards; as, for instance, where a railroad is being built and subscriptions are to be paid in from time to time as the work progresses.<sup>4</sup>

§ 490. *The Same Subject.* — The later decisions exhibit the frequent spectacle of a man, who has been drawn into some projected scheme of profit, repenting afterwards, and seeking to disentangle himself from the consequences. He joins others in going before the legislature to procure an act of incorporation for the proposed company, or else, finding

scribed. *Fry v. Lexington, &c. R. R. Co.*, 2 Met. (Ky.) 314.

<sup>1</sup> *Curry v. Scott*, 54 Penn. St. 270; *Schaeffer v. Missouri Ins. Co.*, 46 Mo. 248.

<sup>2</sup> See *Carr v. Le Fevre*, 27 Penn. St. 413; *Cincinnati R. R. Co. v. Clarkson*, 7 Ind. 595; *Clark v. Farrington*, 11 Wis. 306; *Vermont Central R. R. Co. v. Claves*, 21 Vt. 30; Ang. & Ames, 8th ed. § 517.

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<sup>3</sup> Ang. & Ames, *ib.*; *Haywood P. R. Co. v. Bryan*, 6 Jones, 82.

<sup>4</sup> Ang. & Ames, § 517; Abb. Dig. 789. An engagement being made by a subscriber to pay at stipulated periods, the Statute of Limitations will begin to run against each instalment as fast as it becomes due. *Corning v. McCullough*, 1 Comst. 47.

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that an act has already been obtained, consents to become a party to the new enterprise. In either case, he has signed a subscription paper; but when it comes to a demand of payment, he is found reluctant to take the stock, and ready to assign a number of reasons why he should not be held to his engagement; the truth being that he has been disappointed in some way, and wants to get out of the speculation. Our further examination as to the validity of subscriptions for stock will lead us, then, to consider how far the binding force of a subscription contract may be affected by the circumstance that it was upon conditions which have not been fulfilled, or that it presupposed some state of things which was not realized, or that the subscriber has been fraudulently imposed upon, or that the subscription was not in fact his own, but that of some third person, who had no authority to bind him.

The general law of contracts must be our main guide in forming conclusions under any of these circumstances; the rule being still that a subscription is a contract, and a contract upon consideration whose mutual sufficiency is essential;<sup>1</sup> and further that contracts of this character are controlled

<sup>1</sup> As to conditions precedent which have failed, see Abb. Dig. 793, and cases cited; *Penobscot, &c. R. R. Co. v. Dunn*, 39 Me. 587; *Burlington R. R. Co. v. Boestler*, 15 Iowa, 555. As to alteration of circumstances, see *McMillan v. Maysville, &c. R. R. Co.*, 15 B. Monr. 218; *McCully v. Pittsburgh R. R. Co.*, 32 Penn. St. 25; *Ang. & Ames*, §§ 536-544; *Union Locks Co. v. Towne*, 1 N. H. 44; *Ticonic Water Power Co. v. Lang*, 63 Me. 480. See, also, *Terre Haute R. R. Co. v. Earp*, 21 Ill. 291; *City Hotel v. Dickinson*, 6 Gray, 586; *Milwaukee R. R. Co. v. Field*, 12 Wis. 340; *South Bay Co. v. Gray*, 30 Me. 547; *Cork R. R. Co. v. Paterson*, 18 C. B. 414; Abb. Dig. 808, 811; *Poughkeepsie Pl. R. Co. v. Griffin*, 24 N. Y. 156. As to fraudulent indorsement, see Abb. Dig. 795; *Atkinson v. Pocock*, 12 Jur. 60; *Ang. & Ames*, § 531; *Troy R. R. Co. v.*

*Newton*, 8 Gray, 596; *Central Pl. R. Co. v. Clemens*, 16 Mo. 359; *Pittsburgh R. R. Co. v. Graham*, 2 Grant Cas. 259; *Downie v. White*, 12 Wis. 176; *White Mt. R. v. Eastman*, 34 N. H. 124; *Jennings v. Broughton*, 19 E. L. & Eq. 420; Abb. Dig. 796; *Ang. & Ames*, 8th ed. § 531; *Connecticut, &c. R. R. Co. v. Bailey*, 24 Vt. 465. As to agency, see *Ang. & Ames*, § 517; *Mississippi R. R. Co. v. Harris*, 36 Miss. 17; 154 Ill. 261. A subscription once fully received cannot be cancelled. *Walker v. Mobile R. R. Co.*, 34 Miss. 245; *Lowe v. R. R. Co.*, 1 Head, 659; Abb. Dig. Corp. 795. Not even by the directors. *Bedford R. R. Co. v. Bowser*, 48 Penn. St. 29. As to the contract of membership, see, generally, *Morawetz*, c. iv.; *Field Corp.*, §§ 77-92; *Taylor Corp.* §§ 91-112; 143 N. Y. 537.

and explained by the charter or enabling act of incorporation, together with articles and by-laws made in conformity thereto.

§ 491. **The Same Subject.** — As a general rule, the corporation which seeks to enforce a subscription must show that the terms of its charter have been carefully complied with in the matter of organization; but in some cases compliance will be presumed, and in others it may be waived.<sup>1</sup> And as concerns the subscriber who claims that the subscription in his name does not bind him, it is one thing to defend against the corporation, and another to avoid the demands of persons who are creditors of the corporation; while, furthermore, any defence on the ground of conditions unfulfilled, or material alterations in the charter, or fraudulent misrepresentation, may fail altogether where the subscriber by his acts and conduct shows that he was a party to the fraud, or that he meant to waive his right to annul the subscription.<sup>2</sup> On the other hand one's agreement to take shares ought not to be divested by any pretended assignment or transfer on his part of his interest, to an irresponsible person;<sup>3</sup> nor ought he, as to *bona fide* third persons in interest, to be permitted to set up any secret understanding with the promoters of the scheme inconsistent with his apparent undertaking as a subscriber.<sup>4</sup>

§ 492. **Promoters; Preliminary Subscribers, etc.** — Persons often subscribe before the incorporation of a joint-stock corporation; in which case a mutuality is raised which renders the subscriber liable to the company after its charter has been obtained and the organization is completed.<sup>5</sup> And it has been held that a subscriber in a proposed corporate undertaking cannot withdraw during the progress of a bill in the legislature, so as to exonerate himself from liability.<sup>6</sup>

<sup>1</sup> *Maltby v. Northwestern, &c. R. R. Co.*, 16 Md. 422; Abb. Dig. 789.

<sup>2</sup> See *Ogilvie v. Knox Ins. Co.*, 22 How. 380; Ang. & Ames, § 531; *Deposit Ass. Co. v. Ayscough*, 6 Ell. & B. 761.

<sup>3</sup> See Taylor, § 101; *Graff v. Pittsburgh R.*, 31 Penn. St. 489; *Williams, Re*, 1 Ch. D. 646.

<sup>4</sup> *White Mountains R. v. Eastman*, 34 N. H. 134; Taylor, § 105.

<sup>5</sup> Ang. & Ames, 8th ed. §§ 523-525; *Lane v. Brainerd*, 30 Conn. 577; Abb. Dig. 801.

<sup>6</sup> *Ib.*; *Selma, &c. R. R. Co. v. Tipton*, 5 Ala. 786; 2 Price, 93.

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But in this latter respect the English rule differs somewhat from that in this country; for "promoters," as they are called, of certain enterprises, organize into a preliminary association, in England, before their measure has gone through Parliament; while in most parts of the United States no provision is made by law for preliminary associations, and where application to the legislature is required at all, it is usually made by individuals who have neither organized nor called for general subscription; the charter or act of special incorporation itself or some general law prescribing the method of subscribing and organizing.<sup>1</sup>

§ 493. **Subscribers to New Stock; New Shareholders, etc.**—A subscription to an increase of stock not authorized by the charter is void.<sup>2</sup> But it is no uncommon thing for a company to issue new stock, while keeping within the capital sum authorized by the charter, and to give existing stockholders a privilege to purchase in preference to the public at large. There are cases which treat this privilege of existing stockholders as an exclusive right, though its true extent is to be determined greatly by the language of each charter in question, or of general statutes applicable; and certainly an original subscriber is not compelled to take the new stock, but he may waive or sell out his right.<sup>3</sup> Nor, again, can the corporate power of increasing the stock be so exercised as to cause a discrimination in favor of any set of old stockholders; but the right of each to subscribe for the new stock should be *pro rata* and in proportion to the shares one already holds in the old.<sup>4</sup>

A third person may become a shareholder in a corporation already in existence, by an increase of the number of its

<sup>1</sup> See 1 Redf. Railw. 3d ed. 5 *et seq.*; 364; Ang. & Ames, §§ 554, 555; *Burke v. Lechmere*, L. R. 6 Q. B. 297. The binding force of preliminary papers is diminished by statutes in some States, as in New York. See *Lake Ontario R. R. Co. v. Mason*, 16 N. Y. 451.

<sup>2</sup> *McCord v. Ohio R. R. Co.*, 13 Ind. 220. And see *supra*, § 485.

<sup>3</sup> *Gray v. Portland Bank*, 3 Mass.

<sup>4</sup> *Ib.*; Taylor, § 569. The same *pro rata* doctrine applies in a decrease of capital stock. 93 N. Y. 426; Taylor, § 570.

shares ; in which case the relation assumed is that of adding a new party to the original contract.<sup>1</sup>

§ 494. **The Contract of Membership, and Subscription in General.**—The contract by which the stockholders of a corporation are bound together is, in fact, a purely statutory contract ; for under the common law the right to form a corporation is a special privilege which only legislation can confer, and otherwise there is a simple voluntary association.<sup>2</sup> Special charters and general acts of incorporation usually express specifically how corporations shall be formed and how original subscriptions shall be received.<sup>3</sup> The subscribers do not become stockholders, strictly speaking, until the number of shares required by law have been taken ;<sup>4</sup> nevertheless the subscription itself is a contract upon consideration, and the subscription binds from the time it is made.<sup>5</sup> A subscription for shares will be held valid if made in substantial conformity with the requirements of the charter or act of incorporation.<sup>6</sup>

Unpaid subscriptions to the stock of a corporation constitute a trust fund for the benefit of creditors ;<sup>7</sup> and where shares are voted to a person as a bonus and accepted by him, he is properly subject to the liabilities of a shareholder who has taken stock but has not paid for it.<sup>8</sup>

§ 495. **Transfer of Stock ; General Mode considered.**—We are now brought to the more common method of constituting a person a shareholder in a joint-stock corporation ; namely, by means of a transfer of its stock. Any original shareholder may transfer his shares to another person, and that person to a third, and so on ; and each new holder of

<sup>1</sup> Morawetz, § 262. The new subscriber is not properly a shareholder until, by issue of a certificate, or otherwise, the company has recognized him. *Ib.* ; *Clark v. Continental Ins. Co.*, 57 Ind. 138 ; *St. Paul R. v. Robbins*, 23 Minn. 440.

<sup>2</sup> Morawetz Corp. §§ 4, 257.

<sup>3</sup> Morawetz, § 258 ; *Buffalo R. v. Dudley*, 14 N. Y. 337.

<sup>4</sup> *New Hampshire Central R. v.* 30.

*Johnson*, 30 N. H. 390 ; *Franklin Fire Ins. Co. v. Hart*, 31 Md. 60 ; Morawetz, § 259.

<sup>5</sup> *Lake Ontario R. v. Mason*, 16 N. Y. 451 ; Morawetz, § 260.

<sup>6</sup> *Ashtabula R. v. Smith*, 15 Ohio St. 328 ; Morawetz, § 260. And see, at length, Morawetz Corp. c. iv.

<sup>7</sup> *Fogg v. Blair*, 139 U. S. 118.

<sup>8</sup> *Washburn v. Green*, 133 U. S.

the shares, who holds them under a perfected transfer, takes by substitution the rights and liabilities of the shareholder preceding him, or of the original subscriber. Shares of stock are transferable on the general principles which have been elsewhere considered, being capable of assignment like other modern species of incorporeal property, though by methods somewhat peculiar; and one has also to consider that the mode of transfer may be affected by express provisions contained in the charter.<sup>1</sup> Formalities are often imposed by the by-laws of a corporation in this respect, which, if reasonable, are usually observed, since all will admit that it is a great public convenience for a corporation to have books regularly kept, which may show the names and interests of its members and stockholders, and to use certificates of stock which can be recognized in the market as genuine; yet a corporation cannot impose unreasonable restraints upon the right which each stockholder has of disposing of his own shares at pleasure, and any unusual and onerous restriction of this character will be deemed void.<sup>2</sup> Formalities expressly prescribed, however, by charter or general enactment, must be respected;<sup>3</sup> but, as we have seen, the fundamental right of any stockholder to transfer his shares and let in others as members in his place is a very liberal one.<sup>4</sup>

§ 496. **The Same Subject.** — Certificates of stock are usually issued in the first place by the corporation, and have a blank form of assignment, accompanied by a power of attorney, on

<sup>1</sup> *Supra*, §§ 72-82; Morawetz, § 320; 1 Redf. Railw. 3d ed. 111; Ang. & Ames, § 565; Abb. Dig. Corp. 749.

<sup>2</sup> *Ib.*; Brightwell v. Mallory, 10 Yerg. 196; State v. Franklin Bank, 10 Ohio, 91; Morawetz, § 321; Farmers' Bank v. Wasson, 48 Iowa, 339; Stebbins v. Phoenix Ins. Co., 3 Paige, 350.

Even where the charter provides a mode of transfer, the disposition of the courts is to regard the provision as merely directory, so as not to disturb a title acquired fairly in some

other way, unless, indeed, it is evident that the charter contemplated this as the only mode of transfer. And if the express provisions concerning a transfer exist only in the by-laws of the corporation, still less reason can there be for giving them any exclusive force. See 1 Redf. Railw. 112, 113.

<sup>3</sup> Northrop v. Newton Turnpike Co., 3 Conn. 544; Union Bank v. Laird, 2 Wheat. 390; Morawetz, § 323.

<sup>4</sup> See § 488.

the back of each certificate; the selling party hands these certificates over to the purchaser, filling in and signing this blank form; and the purchaser presents the certificates at the office of the company, which thereupon furnishes him with fresh certificates, while the old ones are cancelled. But as to the essential part of these formalities there is some uncertainty, and the legislature of a State does well when it lays down some explicit rule on the subject. For it is a general principle that stock may be transferred by any suitable written assignment; and it is even held that a transfer of stock is sufficient where the certificate is handed over indorsed in blank, so that the holder can fill up the back of the certificate by writing an assignment and power of attorney over the signature indorsed.<sup>1</sup>

But while the strong tendency of modern times, and especially in this country, is towards sustaining the validity of transfers of stock by means of an instrument containing blanks to be filled up, there are some decisions which still favor the old English rule, and regard with abhorrence the execution of any instrument that leaves important words to be afterwards supplied.<sup>2</sup> In either case it seems fair enough for a corporation to require something more than an indorsement,—some evidence, in fact, of authority for transfer,—before permitting the transfer to stand completed.<sup>3</sup>

§ 497. **Informal Transfer of Stock; Equitable Rights of Buyer.**—But one who sells stock and receives consideration for it, giving the assignment and power of attorney to complete the transfer, cannot afterwards in equity set up any informalities of the instrument to defeat the purchaser's title.<sup>4</sup> And though the legal title to stock cannot ordinarily pass before a transfer is made on the corporation book,—provisions to this effect being now usual in corporate charters or general enactments,—yet an equitable, if not a legal

<sup>1</sup> See Ang. & Ames, 8th ed. § 564, Conn. 231; Day v. Holmes, 103 Mass. 306; Morawetz, § 325.

and cases cited; Kortright v. Buffalo Commercial Bank, 20 Wend. 91;

<sup>2</sup> 1 Redf. Railw. 123, 124.

Abb. Dig. Corp. 749; Bridgeport Bank v. New York, &c. R. R. Co., 30

<sup>3</sup> See Bayard v. Farmers' &c. Bank,

52 Penn. St. 232; § 498, *post*.

<sup>4</sup> Ang. & Ames, § 564.



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transfer may meanwhile have been perfected as between seller and buyer; for such provisions concerning a transfer are for the security of the corporation itself and *bond fide* transferees and perhaps general creditors.<sup>1</sup> Indeed a person to whom shares have been *bond fide* transferred will hold them as against the seller without any certificate; and the purchaser of stock is strongly protected in his purchase; the main question being that of his right to the shares.<sup>2</sup>

One who is thus entitled as of right may compel the corporation in chancery to give the shares to him;<sup>3</sup> and at any rate equity will protect the assignee's interest as a trust as against the assignor;<sup>4</sup> and where the corporation wrongfully refuses to permit a transfer, the assignee of shares has been allowed to sue in assumpsit for damages.<sup>5</sup>

§ 498. **The Same Subject.**—How much deference is to be paid to the language of the charter or statutes relative to the joint-stock corporation we have already suggested; and we may now add that the usual formalities attending a transfer upon the corporation books leave little to the discretion of its managers; for the purchaser simply makes known his right to a transfer, and the register is made accordingly. To require that the transfer be made at the office personally, or by attorney, and with the assent of the president, would be, without some explicit authority to that effect from the

<sup>1</sup> Black v. Zacharie, 3 How. 483; Ang. & Ames, §§ 353, 575; Duke v. Cahawba Nav. Co., 10 Ala. 82; Abb. Dig. Corp. 750.

<sup>2</sup> Taylor, § 511. So, too, one may be a subscriber and liable for his subscription without having a stock certificate. 102 U. S. 314, 316.

<sup>3</sup> Morawetz, §§ 326, 337; Parrott v. Byers, 40 Cal. 614.

<sup>4</sup> Ang. & Ames, § 565; Agricultural Bank v. Burr, 24 Maine, 256; Bank of Attica v. Manufacturers' Bank, 20 N. Y. 501; Presbyterian Cong. v. Carlisle Bank, 5 Penn. St. 345; Sargent v. Franklin Ins. Co., 8 Pick. 98; Morawetz, § 326; Otis v.

Gardner, 105 Ill. 436; Black v. Zacharie, 3 How. 483.

<sup>5</sup> *Ib.*; Commercial Bank v. Kortwright, 22 Wend. 348. See Morawetz, § 338, where objections to this suit at law are stated.

A seal is not essential to the validity of the assignment of shares in a corporation. Atkinson v. Atkinson, 8 Allen, 15. And the transfer having been made on the corporation books to a *bond fide* holder for value, though the seller's certificate was not at the time surrendered, it would appear that no subsequent sale or pledge of the seller's old certificate can impair this holder's title. See Abb. Dig. Corp. 750.

legislature, an assumption of power on the part of the corporation to which no purchaser need submit.<sup>1</sup> And even where the prescribed formalities have been disregarded by the corporation for a long time, a transfer may be sustained as against it on the ground of usage.<sup>2</sup>

But as concerns the extent of transfer which is requisite to exempt the stock from claims of the seller's creditors, and still more of subsequent transferees, the rule appears to be more stringent. It is true that in certain States an assignment and delivery of the certificate is considered effectual, as against a subsequent attachment by a creditor without notice, even where the corporate charter makes the stock transferable on the books.<sup>3</sup> The generally received doctrine, however, in this country is, in substance, that where a transfer on the books is expressly required, the title of the buyer is not good as against subsequent attaching creditors who received no notice of the sale, unless such transfer has been made on the books before the stock is attached;<sup>4</sup> or, at least, unless due diligence has been exercised in having the formalities of transfer completed. The ground on which the stock is most fairly made subject to attachment under such circumstances appears to be that of a presumed unreasonable delay on the purchaser's part in perfecting his equitable title; but other cases, which deal with some specific restriction or requirement contained in a charter or statute, lay down the rule more absolutely.<sup>5</sup> There is considerable difference of opinion as to the point of time from which the transfer of an

<sup>1</sup> Ang. & Ames, § 567; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Gilbert's Case*, L. R. 5 Ch. 559. But where the directors are expressly invested with a discretionary power to approve or disapprove of transfers, they are presumed to have exercised the discretion fairly and not capriciously, and are not bound to state reasons for disapproval. *Penny's Case*, L. R. 8 Ch. 446.

<sup>2</sup> *Chambersburg Ins. Co. v. Smith*, 11 Penn. St. 120; *Bargate v. Shortridge*, 5 H. L. Cas. 297.

<sup>3</sup> *Broadway Bank v. McElrath*, 2 Beas. 24; *Hunterdon County Bank v. Nassau Bank*, 17 N. J. Eq. 496. And see *Black v. Zacharie*, 3 How. 483.

<sup>4</sup> See *Pinkerton v. Manchester, & C. R. R. Co.*, 42 N. H. 424; *Fisher v. Essex Bank*, 5 Gray, 373; *Pittsburgh, & C. R. R. Co. v. Clarke*, 29 Penn. St. 146; 12 Gray, 212; *Skowhegan Bank v. Cutler*, 49 Maine, 316; *Murphy, In re*, 51 Wis. 519.

<sup>5</sup> *Ib.*; *Colt v. Ives*, 31 Conn. 25; *Abb. Dig. Corp.* 752; 1 Redf. Railw. 3d ed. 152-154.

equitable title should be reckoned, as between such a purchaser for value and attaching creditors, so that the present rule with reference to stock cannot be yet considered precise and positive. A person becomes legally entitled to shares by having them transferred on the corporation books whether the certificate has yet issued to him or not.<sup>1</sup>

The precautions we have just indicated apply to the case of a pledge of stock ; <sup>2</sup> and in that connection it is perceived that where the pledgee, or the owner of a certificate of stock assigned in blank, has confided its possession to another, who disposes of it absolutely or in security to some other *bond fide* third party without notice of the fraud, such pledgee or true owner may in many instances be debarred from recovery.<sup>3</sup>

§ 499. **Whether a Stock Certificate may be deemed Negotiable.** — This brings us to the inquiry whether a stock certificate may be deemed a negotiable instrument in any sense when indorsed in blank. On this point there is a discordance among the latest decisions ; and naturally so, for stock is a creature of general or special statute and conforms to the organic law of its creation. In some States a general statute expressly provides that as against attaching creditors and in some respects the corporation, every sale, assignment, or transfer must be recorded, and a new certificate issued to the transferee ; and under such rules a certificate of stock, though indorsed in blank, cannot be regarded as a negotiable instrument.<sup>4</sup> But there are other States where, no such legislation operating, or the statute importing negotiability, the transfer of a certificate in blank is treated as carrying to any *bond fide*

<sup>1</sup> 102 U. S. 314 ; Taylor, § 587.

<sup>2</sup> See §§ 395, 396.

<sup>3</sup> See Mass. Pub. Sta. (1882) c. 105, § 25 ; Gray v. Coffin, 9 Cush. 192 ; *Ex parte* Boulton, 1 De Gex & Jones, 163 ; Wilson v. Little, 2 Comst. 443. An executory contract for the transfer of stock as collateral security for a debt will not be enforced in equity to the injury of the other creditors of one who has died insolvent. City Fire Ins. Co. v. Olmsted,

33 Conn. 476. See chapter on Pledges, *supra* ; also next section.

<sup>4</sup> Mass. Pub. Sta. (1882) c. 105, § 24 (since altered in favor of negotiability) ; Shaw v. Spencer, 100 Mass. 382 ; Sewall v. Boston Water Power Co., 4 Allen, 277 ; Mechanics' Bank v. N. Y. & N. H. R., 3 Kern. 599. And see Athenæum Life Ass. Co. v. Pooley, 3 De G. & J. 294 ; Merchants' Bank v. Livingston, 74 N. Y. 223.

transferee for value, whether by way of sale or pledge, the rights of one who holds all the *indicia* of title.<sup>1</sup> Such a certificate may thereby pass from hand to hand, and the last holder is entitled to fill up the assignment with his own name and have the transfer completed on the books of the company.<sup>2</sup> Whether stock is negotiable in a sense or not, the maxim has sometimes been invoked in favor of its *bond fide* holder as against the owner assigning the certificate in blank and confiding it to an agent who proves dishonest, that of two innocent parties he must suffer who enabled the fraud to be committed.<sup>3</sup>

§ 500. **Transfer of Stock in Special Instances.** — Where a new title is acquired to stock under some trust, or through the

<sup>1</sup> See *Pennsylvania R. R.'s Appeal*, 86 Penn. St. 80; *Cherry v. Frost*, 7 Lea, 1; *Morawetz*, §§ 328-330, and cases cited; *McNeill v. Tenth Nat. Bank*, 46 N. Y. 324. It can hardly be said that the doctrine of negotiable or non-negotiable qualities might not hereafter, as applied to stock, be found modified in any State or country by the provisions of some new charter or legislative act; just as the question whether stock was real or personal property has been answered differently in times past by reference to the organic law of such bodies. And in the case of *Bank v. Lanier*, 11 Wall. 377, it was said that stock certificates declaring the stockholder entitled to so many shares of stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise, though "neither in form or character negotiable paper," yet "approximate to it as nearly as practicable."

It has been held that where certificates indorsed in blank were stolen from the rightful owner and afterwards came into the hands of a *bond fide* purchaser without notice, the latter obtained a valid title to the

shares. *Winter v. Belmont Mining Co.*, 53 Cal. 48. But see 10 Blatchf. 173. Until, however, a transfer of shares has been executed on the books, the seller remains the nominal owner, and should be treated as a trustee for the buyer; the latter taking the shares with such liabilities, and by implication undertaking to indemnify the seller in such respects. *Morawetz*, §§ 330, 602; *Johnson v. Underhill*, 52 N. Y. 203; *Brigham v. Mead*, 10 Allen, 245; *James v. May*, L. R. 6 H. L. 328.

A corporation which has issued a negotiable certificate of shares should not permit a transfer to be executed upon the books until the old certificate is surrendered. If it does so, it may be held liable to a *bond fide* purchaser of the old certificate. *Morawetz*, § 331; *Bank v. Lanier*, 11 Wall. 369. But upon suitable indemnity to the company, equity will grant relief where a certificate is lost or destroyed, as in other analogous instances of negotiable instruments. *Galveston City Co. v. Sibley*, 56 Tex. 269. And see 56 Tex. 439.

<sup>2</sup> *Leitch v. Wells*, 48 N. Y. 586; 47 Iowa, 575; *Morawetz*, § 328; 91 U. S. 65.

<sup>3</sup> But see *Mr. Justice Brewer* in 134 U. S. 401, 403.

death or bankruptcy, or in some cases the marriage, of the shareholder, the formalities requisite will depend somewhat upon local laws which regulate the subject. Administrators can execute a transfer, their letters being sufficient evidence of authority for that purpose ; and so can executors generally, and the assignees of a bankrupt.<sup>1</sup> But as to trusts, there is a disposition sometimes manifested in the courts to protect the corporation which deals solely with the registered owner of its shares ; and at all events the corporation may take proper precautions by requiring the trustee who seeks to deal with the shares to produce evidence of his authority.<sup>2</sup> A corporation is not bound to see to the application of proceeds of its stock ; and so long as the executor or other person making a transfer has authority to do so, and the corporate officers have no reasonable ground for believing that a misapplication of money is intended, there is no ground of complaint against the latter.<sup>3</sup> But a corporation has been held bound to inquire whether the trustee who transfers had any authority to make such transfer.<sup>4</sup>

As regards marriage, stock standing in the wife's name does not belong to the husband, nor is he liable with respect to it, until he has transferred it to his own name.<sup>5</sup> And a married woman has in these days the legal capacity recognized to receive a transfer of stock, whether the consideration proceeded wholly from her husband or from some third party.<sup>6</sup> But a transfer to an infant is held to leave the transferer liable ; on the ground that the person succeeding to shareholding membership must be one who can assume the shareholder's full legal liability.<sup>7</sup>

<sup>1</sup> Bayard v. Farmers', &c. Bank, 52 Penn. St. 232.

<sup>2</sup> *Ib.*

<sup>3</sup> Albert v. Savings Bank, 2 Md. 159 ; 1 Redf. Railw. 3d ed. 151 ; Hutchins v. State Bank, 12 Met. 421.

<sup>4</sup> Loring v. Salisbury Mills, 125 Mass. 151 ; Bayard v. Farmers', &c. Bank, 52 Penn. St. 232 ; Taney's Dec. 310 ; Stewart v. Fireman's Ins. Co., 53 Md. 564.

<sup>5</sup> Schoul. Hus. & Wife, § 154 ; Arnold v. Ruggles, 1 R. I. 165 ; Slaymaker v. Bank, 10 Penn. St. 373 ; Brown v. Bokee, 53 Md. 155. And see L. R. 7 Ch. D. 48.

<sup>6</sup> Keyser v. Hitz, 133 U. S. 138.

<sup>7</sup> Zulueta, *Re*, L. R. 5 Ch. 444 ; Reciprocity Bank, *Re*, 22 N. Y. 9 ; Taylor, § 747.

§ 501. *Lien of Corporation on Stock for Unpaid Dues.*— Among the restrictions upon the transfer of its stock which a corporation may sometimes impose, that of practically securing a lien for its unpaid dues deserves a passing notice. That no lien upon stock in favor of the corporation which issues it exists at the common law, is generally admitted;<sup>1</sup> yet such an advantage is often given by general statutes or the special act of incorporation. The policy of the English “Companies Clauses Consolidation Act,” and of many of our American statutes, is to require the payment of dues to the corporation before any valid transfer of stock can be allowed.<sup>2</sup> Local banks were formerly peculiarly favored in this respect among corporations in our own country; though the same can hardly be affirmed of our existing national banks.<sup>3</sup> If a former owner be indebted to the corporation, and the charter requires all such indebtedness to be liquidated before a transfer of the stock, the corporation’s lien for this indebtedness holds good against the debtor’s assignee. The effect of restrictions of this sort is rather to give the purchaser the property right of the seller, subject to the same incumbrances, than to incapacitate the seller from disposing of his stock. And the lien usually covers all assessments due and payable upon the stock at the date of the new transfer; and it may apply to the owner’s liability to pay for the amount of stock subscribed, although the instalments were not collected before the time of transfer.<sup>4</sup> While, moreover, a corporation cannot resort to unlawful contrivances, or abuse its chartered privilege in order to secure a lien, we generally find that this lien, when once conferred by law, receives a liberal construction in the courts and is held valid and enforceable

<sup>1</sup> Morawetz, § 332, and cases cited; *Farmers’ Bank v. Wasson*, 48 Iowa, 340; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 2 Cranch, C. C. 188; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144.

<sup>2</sup> See Ang. & Ames, §§ 355, 570; 1 Redf. Railw. 111–115; Abb. Dig. Corp. 757; Morawetz, §§ 333, 334.

<sup>3</sup> See *Bank v. Lanier*, 11 Wall. 369; chapter on Liens, *supra*; Ang. & Ames, §§ 355, 569, 8th ed.

<sup>4</sup> *Pittsburgh, &c. R. R. Co. v. Clarke*, 29 Penn. St. 146; Ang. & Ames, § 355, 575, and cases cited; *Ex parte Mayhew*, 5 De G. M. & G. 837; *Reese v. Bank of Commerce*, 14 Md. 271; 1 Redf. Railw. 3d ed. 114.

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against all the world, while, like other liens, it may be lost by waiver.<sup>1</sup>

§ 502. **Transfers made under a Forged Power; Careless Transfers.** — If a corporation allows a transfer of shares to be executed on its books without the consent of the owner, the latter will nevertheless remain a stockholder; and such owner is entitled to have his shares replaced on the books unless concluded by his own fraud or culpable negligence in the transaction. For, in general, the contract of a stockholder in a corporation cannot be rescinded without his own express or implied assent.<sup>2</sup>

So, too, in registering transfers the corporation must exercise due care, as otherwise it will be liable to the shareholder injured;<sup>3</sup> and it must observe, besides, its own regulations.<sup>4</sup> But rights of others which did not come seasonably to its notice cannot constitute ground of liability.<sup>5</sup>

§ 503. **Contracts for Stock; Stock Speculations.** — So great are the temptations to fraud where persons speculate largely in fluctuating stocks, that important questions are constantly arising at the present day, with reference to the validity of

<sup>1</sup> See Morawetz, § 336; Higgs v. Assam Tea Co., L. R. 4 Ex. 387; Hill v. Pine River Bank, 45 N. H. 300; Hammond v. Hastings, 134 U. S. 401. A statute forbidding a stockholder to transfer his stock on the books of a bank so long as he is indebted thereto does not prevent the bank from waiving its privilege through its proper officer. Cecil Bank v. Watson town Bank, 105 U. S. 217. So may a corporation be estopped, as against certain third parties, to assert its lien. Moore v. Bank of Commerce, 52 Mo. 377. But mere ignorance of the lien by a third party does not have this effect. 134 U. S. 401.

By virtue of a by-law (though *qu.* whether the charter or a statute must not, by implication or expressly, confer authority to make it) transfers of shares may be prohibited while one is indebted to the company. Morawetz,

§ 332; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513; Brent v. Bank of Washington, 10 Pet. 616. But no such lien can be claimed as against the *bona fide* purchaser of a certificate who had no notice of such by-law. Driscoll v. West Bradley Co., 59 N. Y. 109. Dividends declared by the company may be retained as a set-off. Hagar v. Union Nat. Bank, 63 Me. 609; Sargent v. Franklin Ins. Co., 8 Pick. 90.

<sup>2</sup> Morawetz Corp. § 339; Dewing v. Perdicaries, 96 U. S. 193; Taylor, § 594; Telegraph Co. v. Davenport, 97 U. S. 369; Pratt v. Taunton Copper Co., 123 Mass. 110; Hambleton v. Central Ohio R., 44 Md. 551.

<sup>3</sup> Taylor, § 592; Pennsylvania R.'s Appeal, 86 Penn. St. 80.

<sup>4</sup> Taylor, § 594.

<sup>5</sup> Taylor, § 595.

stock contracts. Speculations in stock are conducted according to peculiar usages which those outside of financial circles cannot readily comprehend; and considering the great fortunes which are so often at stake, the favorite modes of doing such business are rather loose; so that we find contracting parties pretty much at the mercy of their brokers.<sup>1</sup> A contract for the sale of stock should have a good consideration to support it; and the usual rules apply as in other contracts.<sup>2</sup> And where such a contract is tainted with fraud, courts will set it aside, notwithstanding the parties used words which might be thought susceptible of two meanings.<sup>3</sup>

§ 504. **The Same Subject.** — In these days we often hear of persons who attempt to make what is called “a corner” in stock; which is, as we understand it, to buy in secretly, by a combination of funds, the stock of some company, and force its sudden rise in the market by reason of the scarcity thus occasioned; the object being to profit by selling out

<sup>1</sup> One inquiry pertinent to such contracts is connected with the Statute of Frauds. It was for some time a matter of doubt in England, whether shares in an incorporated company were “goods, wares, or merchandise” within the Statute of Frauds, so as to require an agreement for their transfer to be in writing, where the value exceeded a certain sum, and the buyer neither accepted nor received any part, nor gave something in earnest to bind the bargain, or in part payment. But it would now appear that such shares are not within the statute, and that no written memorandum is necessary. *Wms. Pers. Prop.* 5th Eng. ed. 186, 209; *Humble v. Mitchell*, 11 Ad. & E. 205; *Duncuft v. Albrecht*, 12 Sim. 189. In Massachusetts the law is decided otherwise; and such agreements must be in writing, on the ground that the contract is one for the sale of goods, wares, or merchandise. *Tisdale v. Harris*, 20 Pick. 9; *Baldwin v. Wil-*

*liams*, 3 Met. 365. See *post*, vol. ii. pt. vi.

<sup>2</sup> See *Abb. Dig. Corp.* 763; *Ang. & Ames*, § 563.

<sup>3</sup> Thus an agreement to transfer stock is not satisfied by a transfer of half-paid stock to that nominal amount, when the certificate was taken on a supposition, fraudulently induced, that it represented full-paid stock. *Johnson v. Hathorn*, 2 Keyes, 477. And see *Gore v. Mason*, 18 Me. 84. If one agrees to sell to another a number of shares at a future day, having that number at the time of making the agreement, he is free to sell them before the day to a third person; for unless the contract was for the sale of those particular shares, he complies with the agreement sufficiently by having the requisite number on hand to transfer when the time comes. *Frost v. Clarkson*, 7 Cow. 25; *Hare v. Waring*, 3 M. & W. 362; 1 Redf. Railw. 127.



again before the stock falls, as it soon must, once more to its natural level. Such agreements are declared to be illegal, like betting contracts.<sup>1</sup>

The buyer who is interested in the rise of stocks has long been known among financiers as a *bull*; the corresponding seller interested in depressing stock is a *bear*; either party, if unable to pay his difference, becomes a *lame duck*; and the stock business is often conducted on the basis of a mere nominal sale and transfer at some future day, the difference between the then ruling rates and those agreed upon being made up by the losing party. It is easily perceived that under these circumstances the managing officers of a company, if sufficiently unprincipled, have special opportunities for making money in stock speculations from their intimate knowledge of its condition; and such is too frequently found to be the result, as defrauded stockholders can testify. The gambling feature of stock speculations, as manifested in the case of those who figure upon a natural rise or fall of stocks or securities according to the fluctuations of trade and public confidence, was early noticed by the legislators; and attempts have been made, both in England and parts of this country, to suppress the so-called "infamous practice of stock-jobbing" by the strong arm of the law; but such legislative efforts usually prove abortive.<sup>2</sup>

<sup>1</sup> Accordingly, where one had authorized another to use a fund in the hands of the latter, and belonging to the former, for these purposes, it was held that he could not recover by suit what had been actually thus expended, but only the balance remaining, as for money had and received. *Sampson v. Shaw*, 101 Mass. 145.

<sup>2</sup> The most famous of these acts (since repealed) is Sir John Barnard's Statute, which was passed in the reign of George II.; Stat. 7 Geo. II. c. 8. This act was directed especially against the practice of fictitious sales of stock for a future time, where the seller had not the stock he

sold, neither intended to procure it, and the buyer had no intention to purchase the amount he contracted for; while the real and only object of the parties was, that if the stock should rise the seller should pay the buyer the difference occasioned by the increase in price, and should it fall the buyer should pay the seller the difference occasioned by the increase. See Wms. Pers. Prop. 5th Eng. ed. 185. A similar statute formerly existed in New York, which is also repealed. See *Thompson v. Alger*, 12 Met. 428; *Washburn v. Franklin*, 28 Barb. 27. The great difficulty found with such legislation is that it interferes too much with

§ 505. **The Same Subject; Sales through Brokers.** — Those who purchase and sell stocks act usually through the medium of others. Stockbrokers are the usual agents in such transactions; and English writers speak of the professional “stock-jobber” as one who supplies the public, through the medium of the brokers, with money or stock to the exact amount they require, taking a commission for his services.<sup>1</sup> But this business appears not to be quite so minutely subdivided in the financial centres of the United States. The Stock Exchange in England, and the Brokers’ Board with us, establish rules and sanction certain usages which may materially affect the mutual contracts of the general public; for wherever a rule or usage so established is not unreasonable in itself it binds those dealing there, both members and others who appear through members in stock transaction.<sup>2</sup> Yet as rules among brokers are not always found to be reasonable, so far as their own customers are concerned, there are some recent instances in which sharp practice, under the name of brokers’ usage, fails of protection in the courts.<sup>3</sup> Brokers, after all, are but

the operations of legitimate traffic to work well in practice.

<sup>1</sup> Wms. Pers. Prop. 5th Eng. ed. 186.

<sup>2</sup> *Duncan v. Hill*, L. R. 6 Ex. 255; *Grissell v. Bristowe*, L. R. 3 C. P. 112.

<sup>3</sup> Thus, it is decided in Massachusetts that the order of a customer to buy stock deliverable to him at any time within a certain period, at his own option, does not authorize his broker to purchase the stock for himself at an intermediate period, and then deliver it to the customer when called for, at an advanced price and interest besides the usual commission; and this notwithstanding a usage among brokers to that effect. *Day v. Holmes*, 103 Mass. 306. And in New York it is held by a majority of the Court of Appeals that where stockbrokers, at a customer’s request, and on his behalf, though in their own names and with their own funds,

purchase certain stocks, — he depositing with them a “margin” which is to be “kept good” and they “carrying” the stock for him, — the stock is the customer’s property, pledged in a manner to them as security for their advances; and that they have no right to sell the stock without notice whenever by its fall the “margin” is exhausted. *Markham v. Jaudon*, 41 N. Y. 235. But see further, as to “margin” transactions *Schoul. Bailm.* § 233. In general the broker of a buyer has no right to profit as the secret broker of the seller, or as himself the undisclosed seller. *Kimber v. Barber*, L. R. 8 Ch. 56. In other words, while reasonable usages and rules of the Brokers’ Board may control a stock contract, the parties being ordinarily presumed to have acted with reference thereto, the agent must not absorb the functions of his principal, nor speculate for his private

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agents; and unless special agreement varies the rule, it is the principal's judgment that should control in the purchase and sale of stocks.<sup>1</sup>

§ 506. *False Representations by Directors inducing Sale of Stock.* — Where the directors of a company have made false representations concerning the state of the corporate affairs for the purpose of influencing the sale of shares at an undue price; and, in general, wherever there are fraudulent practices on the part of managing agents or managing stockholders, and sales have been wrongly induced in consequence, equity will afford relief.<sup>2</sup> And among the most palpable frauds of this kind is that of declaring dividends where there are no profits to be divided up, and their payment is actually made out of the capital stock. But, to constitute a fraud in such cases, the parties must ordinarily stand upon an unequal footing; for where both those who misrepresent and those who suffer by the misrepresentation are under the same delusion as to the value of the shares, interference on the ground of fraud would be hardly admissible.<sup>3</sup>

§ 507. *Transfer of Stock on Execution Sale, etc.* — Shares of stock cannot by the common law be transferred by sale on execution; certainly not where the incorporeal right which they evidence is an incident to personal property instead of real estate. Nor, for similar reasons, can one's stock be subjected to the process of garnishment or trustee process. But the rule is very generally changed, to a considerable extent, by legislation; and in most of our leading States there are

benefit with property which belongs to a customer.

There are numerous other recent cases affecting the rights of stock-brokers, which we need not particularly notice, further than to remark that the liability for purchasing spurious shares, which are issued fraudulently by a corporation, does not appear to rest upon a broker who has bought in good faith what purported to be genuine on their face, but rather upon the seller of the

shares who is represented in the transaction. See *Brown v. Phelps*, 103 Mass. 313; *Marted v. Paine*, L. R. 6 Ex. 132; *Durant v. Burt*, 98 Mass. 161; *Addis. Cont.* 5th ed. 191; *Cruse v. Paine*, L. R. 4 Ch. 441.

<sup>1</sup> *Galigher v. Jones*, 129 U. S. 193.

<sup>2</sup> 1 Redf. Railw. 3d ed. 138-143; *Stainbank v. Fernley*, 9 Sim. 559; *Burns v. Pennell*, 2 H. Ld. Cas. 497.

<sup>3</sup> *Ib.*; 2 Kent Com. 469; 1 Story Eq. Jur. § 142.

statute regulations concerning the attachment and sale of stock on execution, which should be carefully followed.<sup>1</sup>

§ 508. **Preference Shares or Preferred Stock; Scrip, etc.**—Preference shares, or shares in preferred stock, confer special privileges or benefits upon the holder, creating a perpetual charge upon the income of the company, unless expressed after a more limited tenor. The rights of a preferred member are, in important aspects, those of a creditor; but every issue of preferred stock depends upon its own express provisions and the terms of legislative sanction.<sup>2</sup> Preferred stock is properly created in any case by authority of law and in pursuance of the terms of the corporate charter; and while the claim to issue it is sometimes deduced as an incident to the power of borrowing money, the general doctrine appears to be that express authority should have been conferred. Preferred stock takes priority over the common stock, and is first entitled to dividends from the profits, which may or may not be made cumulative.<sup>3</sup>

“Scrip” is a kind of certificate sometimes issued in England by the projectors of companies, entitling the holder to become a member and stockholder of a future company.<sup>4</sup> In this country, “rights,” too, are issued under certain lesser circumstances, as in declaring a stock dividend or in enlarging the amount of stock; so as to entitle the holder to new shares of stock; and these rights are sold by a stockholder in lieu of the stock itself, as scrip might be.

§ 509. **Rights of a Stockholder; Membership, Voting, etc.**—*Thirdly*, as to the rights of a stockholder. It should be re-

<sup>1</sup> *Howe v. Starkweather*, 17 Mass. 240; *Bingham v. Rushing*, 5 Ala. 403; *Ang. & Ames*, §§ 588, 589; *Wms. Pers. Prop.* 5th Eng. ed. Am. notes, 188.

<sup>2</sup> *Morawetz Corp.* §§ 352, 353; *Henry v. Great Northern R.*, 4 K. & J. 1, 21; *L. R.* 5 Eq. 519; *In re Bangor Slab Co.*, *L. R.* 20 Eq. 59; *Bates v. Androscoggin R.*, 49 Me. 491; *St. John v. Erie R.*, 22 Wall. 136.

<sup>3</sup> *Field Corp.* § 121; *Ex parte Worth*, 4 Drew, 529; *Morawetz*, §§ 230, 353; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, and cases cited *post*, § 510; 162 Mass. 388. Whether a corporation may, on the first issue of its stock, divide into classes, issuing part as preferred stock without express authority of law, is undecided. See *Taylor*, § 571; *Kent v. Quicksilver Co.*, 78 N. Y. 159.

<sup>4</sup> See *Field*, § 122, and cases cited;

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membered that all holders of stock in a corporation stand in a twofold relation: they are parties investing in the stock of a fictitious being; and, again, they are component parts or members of that fictitious being. They control and enjoy the property in stock with its income; but, besides, they ultimately control the business in which they invest, and, if chosen on the board of directors, aid in its immediate management. Consistently with the number of shares represented, stockholders have equal rights as well as equal liabilities.<sup>1</sup>

An important right, then, as incidental to holding stock, is that of voting at the corporate meetings on matters of business there presented, and particularly in the election of directors or other managing officers. The transfer-book generally determines the right of voting at this day accordingly. The old common-law rule, applicable still to public corporations, is that voting must be in person. But the laws which relate to joint-stock corporations usually confer the right to vote by proxy; though it would seem that, independently of legislative sanction, voting by proxy is not allowable where an election depends upon the exercise of judgment.<sup>2</sup>

A trustee who holds stock in that character for the benefit of others may vote; and so may executors and administrators by right of representation.<sup>3</sup> But a trustee who has no substantial interest, and merely holds shares in trust for the benefit of the corporation, has no right to vote upon such shares.<sup>4</sup> An equitable assignment does not effect a change

*Penobscot R. v. Dummer*, 40 Me. 172; 14 N. Y. 336, 546; *Watkins v. Eames*, 9 Cush. 537; *Midland G. W. R. v. Gordon*, 16 M. & W. 804.

<sup>1</sup> *Morawetz*, §§ 374-380; *supra*, § 222.

<sup>2</sup> *Ang. & Ames*, §§ 113, 129, 130; *Overseers of the Poor v. Sears*, 22 Pick. 122; 2 Kent Com. 295 n.; *Morawetz*, § 360; *Taylor v. Griswold*, 14 N. J. L. 222. Whether a by-law alone can confer the right to vote by proxy, see *Morawetz*, § 360. At com-

mon law it seems that each shareholder is entitled to but one vote; but the statutes relating to joint-stock corporations usually allow every shareholder a vote upon each share held by him. *Taylor v. Griswold*, *supra*; *Morawetz*, § 360; *Taylor*, §§ 579, 580.

<sup>3</sup> *In re Barker*, 6 Wend. 509; *Bailey v. Hollister*, 26 N. Y. 112; 63 Barb. 556; *Wilson v. Central Bridge Co.*, 9 R. I. 590.

<sup>4</sup> *Ang. & Ames*, § 131; *American*

of membership; and hence a seller of shares may vote upon them until a transfer has been duly recorded.<sup>1</sup> A pledgor of stock retains, moreover, the right to vote on his shares before the security is enforced and title becomes absolute in the pledgee.<sup>2</sup> If stock owned by a partnership stands in the name of one member, and he dies, the surviving member, and not the administrator of the deceased, has the right to vote thereon.<sup>3</sup> But a corporation cannot vote upon the shares which it owns of its own stock.<sup>4</sup>

§ 510. **Stockholder's Right to Dividends.** — Viewing the shareholder as an investing party, we find that, besides the right to dispose of his share by transfer, which has been recently discussed, and which includes the usual rights of gift, sale, and bailment, he has the right of drawing a proportional share of the profits, which are periodically declared under the name of dividend; and in case the company is wound up, and the capital stock becomes divided among the members of the corporation, he is also entitled to that proportion which his stock bears to the whole number of shares. Dividends must be made impartially and equally, preferring no class unfairly above another; otherwise, equity may interfere and order a readjustment.<sup>5</sup> To this rule there is, however, an exception made in the case of preferred stock; for there is a special agreement raised with such holders, by which they receive rather a periodical payment, or what might be called a preferred dividend, than a dividend as ordinarily understood.<sup>6</sup>

*Railway Frog Co. v. Haven*, 101 Mass. 398; *Brewster v. Hartley*, 37 Cal. 16; 20 Hun, 355. In general a corporation cannot hold its own shares in such a sense as to be able to vote upon them. *Ib.*; *Morawetz*, § 361.

<sup>1</sup> *Morawetz*, § 360; *O'Neil v. Nat. Bank*, 46 N. Y. 332.

<sup>2</sup> *Ang. & Ames*, § 132; *Merchants' Bank v. Cook*, 4 Pick. 405; *Hoppin v. Buffum*, 9 R. I. 513; 22 Vt. 274; 26 Hun, 453; *Schoul. Bailments*, § 216.

<sup>3</sup> *Allen v. Hill*, 16 Cal. 113.

<sup>4</sup> This is a rule of public policy;

and the device of putting the shares in some person's name as trustee does not remove the disability. *Taylor*, § 136; 101 Mass. 398; *Vail v. Hamilton*, 85 N. Y. 453; note *supra*.

<sup>5</sup> *Brightwell v. Mallory*, 10 Yerg. 196; *Ang. & Ames*, § 557; *Ryder v. Alton, &c. R. R. Co.*, 13 Ill. 516; *Morawetz*, §§ 374, 405.

<sup>6</sup> *Bates v. Androscoggin R. R. Co.*, 49 Maine, 491; *Taft v. Hartford, &c. R. R. Co.*, 8 R. I. 310; *Pittsburg R. v. Allegheny Co.*, 63 Penn. St. 126; *St. John v. Erie R.*, 22 Wall. 136; *Thompson v. Erie R.*, 45 N. Y. 468.

See *supra*, § 508. Payments of in-

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To pay dividends out of capital, and indeed from anything except actual profits and earnings, should be authorized specially by law; and in fact, when dividends are declared simply as such, but paid out of the capital, the corporation may be pronounced a fraud upon the community.<sup>1</sup> The net earnings should be considered, by deducting expenses from gross receipts; and the payment of interest periodically accruing upon bonded debt should be paid from these net earnings before a dividend can be properly declared.<sup>2</sup>

The duty which rests upon a corporation of declaring dividends, where profits are in hand, is indefinite and discretionary, though it doubtless exists; and the right to compel that duty belongs rather to the community of members, or, if government be thereby defrauded of the opportunity to tax, to the public especially, than to any particular member of the corporation. Not even a preferred shareholder can claim a dividend simply because profits exists.<sup>3</sup> Profits might be *bond fide* applied at discretion in payment of floating or funded debts, or to develop the corporate business; but if a dividend or distribution of profits be wrongly withheld, any aggrieved stockholder may, as a last resort, seek relief in equity.<sup>4</sup> When, however, a dividend is once declared, it becomes a debt due from the corporation to the individual stockholder; and, as it is said, the right to the profits becomes individualized, while the duty to distribute in certain proportions becomes attached as a right to each

terest on preferred stock can only be made out of profits *bond fide* earned. *Ib.* And see Taylor, § 565. But the directors have not the broad discretion to declare or withhold a dividend as in the case of ordinary stock; but courts of equity will here insist upon payment according to the terms of the contract, if the current earnings permit of it. *Field Corp.* § 121, and cases cited; *St. John v. Erie Co.*, 22 Wall. 136. Dividends on preferred stock are naturally cumulative, and take full precedence of ordinary dividends. But they

may be issued as definitely upon a non-cumulative or qualified basis. See 17 Wall. 96; *Hazeltine v. Railroad Co.*, 79 Me. 411; 119 U. S. 296.

<sup>1</sup> *Painesville R. R. Co. v. King*, 17 Ohio St. 534. As to the rule applicable to the holder of "preferred and guaranteed stock," see *Taft v. Hartford, &c. R. R. Co.*, 8 R. I. 310.

<sup>2</sup> *Mobile R. v. Tennessee*, 153 U. S. 486.

<sup>3</sup> 119 U. S. 296; 162 Mass. 388.

<sup>4</sup> *Morawetz*, § 348; *Pratt v. Pratt*, 33 Conn. 446; *Smith v. Prattville Man. Co.*, 29 Ala. 503; *Taylor*, §§ 562, 563.

member distributively.<sup>1</sup> Accordingly, where a dividend is declared, and the money is deposited in a bank, and the bank fails, it is held that the corporation must pay to the stockholders notwithstanding.<sup>2</sup> For the dividend is strictly demandable by each stockholder at the office of the company; and where it is paid through some bank, the bank is merely an agent of the company. Dividends are declared by some formal act of the corporation or its directors.

One who purchases stock has the right, upon completion of his transfer, to all dividends subsequently declared by the corporation; and it makes no difference, so far as his rights are concerned, that the surplus fund from which a dividend is declared was earned in great part before he became a stockholder.<sup>3</sup>

A genuine stockholder may proceed in equity to restrain the payment of dividends to the holders of spurious stock, and the directors of the corporation may be enjoined from misapplying the funds for any such wrongful purpose.<sup>4</sup> To enforce the payment of one's own rightful dividend, a suit in assumpsit is properly brought against the corporation; but a demand should first be made.<sup>5</sup> Peculiar considerations apply, however, to the holder of guaranteed and preferred stock in this respect;<sup>6</sup> and the right of such shareholder to compel the declaration of a dividend where funds which are applicable exist is strongly asserted.<sup>7</sup>

§ 511. *Liabilities of a Stockholder; how far liable for Corporate Debts.* — *Fourthly*, concerning a stockholder's liabili-

<sup>1</sup> *Jackson v. Newark P. R. Co.*, 31 N. J. Law, 277; *Abb. Dig.* 301; *King v. Paterson R. R. Co.*, 5 Dutch. 82, 504. And see *Le Roy v. Globe Ins. Co.*, 2 Edw. 657; *Morawetz*, § 351.

<sup>2</sup> *Ib.*

<sup>3</sup> *March v. Eastern R. R. Co.*, 43 N. H. 515; *Goodwin v. Hardy*, 57 Maine, 143. See, as to the bequest of shares, stock dividends, &c., *supra*, §§ 143, 483.

<sup>4</sup> *Abb. Dig. Corp.* 302; *Morawetz*, § 351; 2 Edw. Ch. 657; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17.

<sup>5</sup> *Abb. Dig.* 303; *King v. Paterson R. R. Co.*, 5 Dutch. 504; *Morawetz*, § 351; *Hagar v. Union Nat. Bank*, 63 Me. 509.

<sup>6</sup> See *Williston v. Michigan, &c. R. R. Co.*, 13 Allen, 400; *supra*, § 483.

<sup>7</sup> *Boardman v. Lake Shore R.*, 84 N. Y. 157; 119 U. S. 296; *Taylor*, § 563.



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ties. Now, these are to be viewed both with relation to the public and to the corporation itself. As concerns the public, a stockholder may be regarded as personally responsible to a greater or less degree for debts incurred by or on behalf of the corporation, though perhaps only remotely so. How far, then, is he responsible? At the common law there is a distinction taken between the personal liability of members of private corporations, and that of members of such public corporations as towns and counties; for, as to the former class, no individual liability attaches to the members, though the corporation may be sued directly; while as to the latter, though the power to sue is first conferred by statute, each inhabitant is liable to satisfy the judgment.<sup>1</sup> So far as a joint-stock corporation is concerned, which is only a species of private corporation, there is at law no immediate personal liability of the members at law for corporate debts; and as statutes usually read, liability in any case is limited by the actual investment; and herein consists a great advantage which these corporations enjoy over partnerships, since, as we have seen, every member of a firm is responsible for all the debts.<sup>2</sup>

Coming, however, more directly to the individual liability of shareholders in a joint-stock corporation, we observe that in daily practice the subject is found to depend almost

<sup>1</sup> See 2 Kent Com. 221; Ang. & Ames, § 629.

<sup>2</sup> *Ib.*; Abb. Dig. Corp. 376-412; *Merchants' Bank v. Cook*, 4 Pick. 414; *supra*, §§ 215, 247. Of course, by a joint-stock corporation we mean one that is regularly incorporated under a charter or act of the legislature; for a joint-stock company, so called, is much the same as a partnership, so far as the personal liability of its members is concerned. See *supra*, §§ 201-205.

Where partners, or the associates in an unincorporated joint-stock company, procure an act of incorporation, and go on with their former business, complicated questions may

arise as to the transfer of individual liabilities, by reason of the act of incorporation. The general principles of the law of partnership (which apply to such cases) have been marked out already; and we need only say here that, while an act of incorporation might operate as a dissolution of the previous company, yet the members remain liable still as partners to those who had no notice of the dissolution, where they go on using the old name of the company as before. See Ang. & Ames, 8th ed. § 592 and *n.*; *Goddard v. Pratt*, 16 Pick. 412; *Whitwell v. Warner*, 20 Vt. 425. And see *supra*, §§ 192, 193.

entirely upon the construction of charters and of special or general statutes; nor does it appear that a uniformity of construction is applied to statutes of this description. We have said that by common law the shareholders or members of such corporations are not individually liable for the corporate debts; and since positive law fastens the obligation, if any, and defines its limits, so is it fair that provisions imposing the obligation should be construed strictly. Where neither a charter nor any act of the legislature creates this individual liability, a mere by-law of the corporation is not enough to give it a legal existence.<sup>1</sup> The common-law rule of individual exemption from liability has been frequently asserted, and in extreme cases; as, for instance, where the members manifested a mistaken impression, in the corporate dealings, that they were personally responsible.<sup>2</sup> A stockholder is not answerable for judgments obtained against the corporation; nor can the treasurer be made to respond in his personal capacity for liabilities which are properly presentable to him as a corporate officer.<sup>3</sup> Not even does a decree of dissolution *per se* make the stockholders personally liable for the debts of the concern.<sup>4</sup> Judgments enforced directly against the corporation might, however, exhaust the corporate property, leaving the corporate stock worthless.

§ 512. **The Same Subject; Rule of Equity.**—Now how far is a stockholder personally liable in equity for the corporate debts? It was ruled by Judge Story, in a leading case, that the capital stock of a bank is a trust fund for the payment of its notes; and that if, before the expiration of its charter, the capital stock be divided among the stockholders without making adequate provision for the outstanding notes, it may be followed in equity into the hands of the stockholders. In such case the decree against the stockholders before the court should be for their contributory share of the debt, in the proportion which their stock bore to the whole.<sup>5</sup> This

<sup>1</sup> Ang. & Ames, § 595 *et seq.*; Trustees of Free Schools v. Flint, 13 Met. 539.

<sup>2</sup> Vincent v. Chapman, 10 Gill & J. 279.

<sup>3</sup> French v. Fuller, 23 Pick. 108; Whitman v. Cox, 26 Maine, 335.

<sup>4</sup> Tarbell v. Page, 24 Ill. 46.

<sup>5</sup> Wood v. Dummer, 3 Mas. 308.

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doctrine has since been applied in a number of instances; courts of equity assuming jurisdiction in the premises, and dealing with the capital stock as a trust fund for the like purposes.<sup>1</sup> The liability of subscribers to assessment, their unpaid subscriptions to the capital stock, the surplus funds of the corporation undistributed as dividends, — all of these equity has laid hold of, to enforce payment of the debts of an insolvent corporation. Here the suit should be that of one or more creditors on behalf of all and not for any exclusive or partial benefit; but in general a bill may be brought against the stockholders after the creditors have exhausted all legal means against a corporation which fails to assess and satisfy.<sup>2</sup> And the rule of individual liability has thus been enforced in equity to an extent unknown in courts of law, where general principles offer the only rule of guidance.

§ 513. **The Same Subject; Modern Legislative Policy.** — But in these later times legislative policy largely discountenances the common law in this respect, and lends a strong support to the doctrines of equity. Thus, in many States, the stockholders of joint-stock corporations are now made personally liable to a considerable extent for the corporate debts; or, at any rate, the liability of each shareholder extends in specific terms to the interest which he holds in the concern.<sup>3</sup> Statutes like these come up frequently for construction in the courts; and sometimes it is found that the legislative provisions are aimed at some particular kinds of joint-stock corporations, such as those organized for manufacturing or mechanical purposes. The fairer rule seems to be to limit the personal liability of stockholders to the nominal value of their shares, except in cases of fraud, or, when the statute is explicit otherwise, in matters of public policy.

<sup>1</sup> See Ang. & Ames, 8th ed. §§ 600-605 and *n.*; *Cooper v. Frederick*, 9 Ala. 742; *Dudley v. Price*, 10 B. Monr. 84; *Bigelow v. Cong. Society*, 11 Vt. 283; *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 598.

<sup>2</sup> *Handley v. Stutz*, 137 U. S. 366; 131 U. S. 319.

<sup>3</sup> See Ang. & Ames, 8th ed. §§ 605-609 and *n.*; *Crease v. Babcock*, 10 Met. 547; *Hitchins v. Kilkenny R. R. Co.*, 15 C. B. 459; *Rosevelt v. Brown*, 1 Kern. 148; *Garrison v. Howe*, 17 N. Y. 458.

Where, as is sometimes the case, stockholders are subjected, each in his private estate, to the debts of the corporation, the equity rule is transcended by the legislature, — since that only treats the capital stock as a trust fund, — and the anomaly is introduced of a corporation composed of persons who might as well have prosecuted their enterprise without being incorporated at all.<sup>1</sup> Under these circumstances, the stockholder derives little substantial comfort from the legal provisions sometimes inserted, which require creditors to first obtain judgment against the corporation.<sup>2</sup>

But officers and trustees of corporations are sometimes made by statute personally liable to the corporate creditors for neglect in performing their duties; and the legislative policy may wisely discriminate between the officers and shareholders of a corporation, making the latter only liable by way of sureties; while holding the former, who manage the business and ought to know the condition of affairs, responsible in the first instance.<sup>3</sup> On the other hand, the managers of the business corporation, or some outside committee which controls the creditors of an insolvent concern, will sometimes force a reorganization of the corporation, on a basis which scales down the stock or otherwise compels a virtual assessment upon the shareholders.<sup>4</sup>

Statutes, again, sometimes provide for the division of the capital stock into "general stock" and "special stock;" holders of the special stock being made liable for the corporate debts only to the extent of their stock, while holders of the general stock are jointly and severally liable for the corporate debts; and this arrangement is similar to that of a limited partnership with general and special partners.<sup>5</sup> And once more our general statutes relating to corporations provide not unfrequently that the joint and several liability of stockholders shall extend only to specified instances.<sup>6</sup>

<sup>1</sup> See *Longley v. Little*, 26 Maine, 162; *Abb. Dig. Corp.* 400; *Moss v. Oakley*, 2 Hill, 269; *Eaton v. Aspinwall*, 19 N. Y. 119.

<sup>2</sup> See *Corning v. McCullough*, 1 Comst. 47; *Ang. & Ames*, § 612.

<sup>3</sup> *Cambridge Waterworks v. Somerville Dyeing, &c. Co.*, 4 Allen, 239; *Waters v. Quimby*, 3 Dutch. 198.

<sup>4</sup> See § 416.

<sup>5</sup> See N. Y. Act of 1855, c. 290.

<sup>6</sup> In *Massachusetts* a general stat-

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§ 514. **The Same Subject.** — It is hardly necessary to add that all these statutes which extend the common-law responsibilities of shareholders ought to receive a strict construction. Indeed, a legislature which has reserved no power to alter a corporate charter cannot retrospectively increase the individual liability of the corporate shareholders afterwards; for this would be in violation of constitutional law.<sup>1</sup> Yet, on the other hand, if a statute makes the stock of shareholders liable for the corporate debts, its subsequent repeal would be unconstitutional as respects existing creditors.<sup>2</sup>

§ 515. **Liability of Stockholders for Torts of a Corporation.** — The personal liability of shareholders for debts of the corporation is one thing, and for claims or demands growing out of a tort quite another. Yet, on the usual principles, where persons obtain undue advantage by fraud and deceit in a certain business, and thereby mislead *bond fide* creditors, they are personally liable, even though the business was carried on in the name of a corporation.<sup>3</sup>

ute provides that president and directors shall be jointly and severally liable only for consequences of consenting to a dividend which renders the corporation insolvent, or of loaning to a stockholder, or of signing false statements of the condition of the corporation. Stockholders are liable only (under certain qualifications) for debts contracted before the original capital is fully paid in; for debts due to operatives; for such amounts as may be requisite to redeem special stock, or for the payment of debts existing at the time the capital is reduced, to the extent of the sums withdrawn and paid to stockholders. Stockholders and officers are not liable until judgment is recovered against the corporation and returned unsatisfied. The statute expression is quite cautious on most of these points. Mass. Pub. Sts. (1882) c. 106, § 60. Statutes of this character, with variations of expression, are to be found in most, if not all, of the United States.

<sup>1</sup> Ang. & Ames, § 767; *Sherman v. Smith*, 1 Black, 587.

<sup>2</sup> *Hawthorne v. Calef*, 2 Wall. 10.

See further, on this subject of individual statutory liability, Morawetz, §§ 606-628, and cases cited; *Hawthorne v. Calef*, 2 Wall. 10; *Pollard v. Bailey*, 20 Wall. 520; *Terry v. Little*, 101 U. S. 216. That one is not liable as a "stockholder," within the meaning of such acts, who has sold his shares, though still registered on the books, see *Cutting v. Damerel*, 88 N. Y. 410; *Wakefield v. Fargo*, 90 N. Y. 213. But one cannot transfer his shares to some irresponsible person, when a corporation is in failing circumstances, so as to avoid further liability to creditors on his own part. *Taylor*, § 749; 107 U. S. 251; 121 U. S. 27.

<sup>3</sup> *Medill v. Collier*, 16 Ohio St. 599; Abb. Dig. 378; *Whitwell v. Warner*, 20 Vt. 425. Fraud in a contract — *e.g.*, for a subscription to shares — renders the contract voidable at the instance of the defrauded party. But

**§ 516. Liability of Stockholders for Calls, Assessments, etc. —**

It remains to speak of that other liability of stockholders which has reference to the corporation itself, and is known as the liability for assessments, or calls. Railway, mining, and other companies are frequently organized and put into operation without sufficient funds to complete the projected work. If the demand of the corporation upon the subscriber was split up so that his subscription became payable in instalments, he may be called to pay each instalment as fast as it becomes due; and the term "assessment" in this country, or "call" in England, is sometimes applied accordingly. But these terms are substantially equivalent; and, more correctly speaking, there is an "assessment" or "call" where the corporation, instead of issuing new shares or getting further instalments from subscribers, relieves itself of pecuniary embarrassment by levying a sort of tax upon the shares outstanding. The power of a corporation to assess shares in this way must depend upon the nature of the subscribers' engagement, or be derived from the charter or statute; for at common law a corporation, as incident to its corporate existence, has no legal right to assess for its own use a sum of money upon the members, or the corporate stock, and compel the payment thereof by an action at law. The power of taxation must be derived either from the shareholders' express promise, or from the legislature, the fountain of authority in matters relative to corporations.<sup>1</sup>

The extent of a stockholder's liability (aside from statute) to pay future assessments depends, then, upon the extent of the engagement, on his part, which is sometimes to pay assessments upon all the shares he may at any time own, and sometimes to pay upon those only for which he originally subscribed; in fact, the contract may take a variety of

it is settled that creditors who in good faith trust the corporation on the faith of such subscriptions and the security of a capital, stand in the position of innocent purchasers for value to the extent of their equitable lien. *Oakes v. Turquand*, L. R. 2

H. L. 325; 3 C. P. D. 307; *Morawetz*, § 595. And see Mr. Justice Miller in *Upton v. Tribilcock*, 91 U. S. 55.

<sup>1</sup> See *Abb. Dig. Corp.* 25-40; *Ang. & Ames*, § 544; *Morawetz*, § 281.

shapes, according to the mutual intent of the parties concerned.<sup>1</sup> Where the legislature has intervened in the matter, the provision is sometimes that all assessments shall be determined by the directors, or sometimes that the corporation alone, and not the directors, shall exclusively exercise the power; and where the statute declares that no assessment beyond a fixed sum shall be laid, any further assessment would be void.<sup>2</sup> All of the legal formalities should be carefully followed, even to the notice of meeting for voting an assessment. When stock is subscribed to be paid upon call of the company, or an assessment is proper, and the company refuses or neglects to do its own duty in the matter, a court of equity may itself make the requisition when the interests of the creditors require it.<sup>3</sup> But any such call or assessment should be compelled in the name of the corporation or person legally entitled to make it.<sup>4</sup>

§ 517. **The Same Subject.** — Whether a corporation may sue a subscriber in the first instance, upon his agreement to take shares, is a point on which the authorities are somewhat at variance. Forfeiture and sale of the delinquent person's shares is a common remedy given as a penalty for any failure, on a stockholder's part, to pay his legal assessments. These and similar provisions seem sometimes to be regarded as affording a merely cumulative remedy; but the better rule appears to be, that where one has made an express promise to pay the assessments, he may be sued directly upon this promise, before any sale of his shares is made; and that where his promise was only to take a specified number of shares, and he did not expressly agree to pay assessments, his shares must be sold before any action will lie against him.<sup>5</sup> Where an original subscriber makes himself liable for calls for instalments on his shares, his liabilities are fre-

<sup>1</sup> *Ib.*; *Franklin Glass Co. v. Alexander*, 2 N. H. 380; *Seymour v. Sturgess*, 26 N. Y. 134; *Palmer v. Ridge Mining Co.*, 34 Penn. St. 288.

<sup>2</sup> *Winsor, ex parte*, 3 Story, 411; *Lewey's Island R. R. Co. v. Bolton*, 48 Me. 451.

<sup>3</sup> *Hawkins v. Glenn*, 131 U. S. 319; 133 U. S. 30; 135 U. S. 533.

<sup>4</sup> *Glenn v. Marbury*, 145 U. S. 499.

<sup>5</sup> See *N. H. Central R. R. Co. v. Johnson*, 10 Fost. 390; *Abb. Dig. Corp.* 39, and cases cited.

quently transmitted to the purchaser from him, so far as concerns calls subsequent to the purchase; provided always that such transfer is made in good faith on his part;<sup>1</sup> and this is in conformity with the usual rule as to a stockholder's rights and liabilities.<sup>2</sup>

Independently of statute, equity has sometimes interfered where there were strong reasons for so doing; as, for instance, to relieve against a demand for a call or assessment which is fraudulently levied by the corporation; or to compel the payment of unpaid calls or assessments, for the benefit of creditors, where the directors have failed to perform their duty with diligence.<sup>3</sup>

§ 517 *a*. **Rights of Stockholders on Dissolution.** — The winding up of a corporation may last for a considerable time after it has ceased to do business.<sup>4</sup> And the rights of the stockholders in regard to the assets of an expiring corporation are, in absence of an agreement to the contrary, to have the property converted into cash and its value ascertained by a sale; and this even though a sale is not necessary for the payment of debts.<sup>5</sup> In fact the properties of a corporation constitute a trust fund; first for the payment of debts, and next for distribution among the stockholders according to their respective interests; and if the directors dispose of the assets to the prejudice of these parties in interest, in reckless or fraudulent disregard of the trust committed to them, equity will hold them to account and follow the diverted funds.<sup>6</sup>

<sup>1</sup> See § 514, note.

<sup>2</sup> *Merrimac Mining Co. v. Levy*, 54 Penn. St. 227.

<sup>3</sup> See *Thorpe v. Hughes*, 3 My. & C. 742; *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 593; also 1 Redf. Railw. 3d ed. 212, 214. And see *Oglesby v. Attrill*, 105 U. S. 605; § 518.

Subscribers to stock, who have expended money and incurred liability as trustees on behalf of an association, both before and after its incorporation, cannot compel the other subscribers to contribute, indepen-

dently of some agreement to that effect. *Shibley v. Angle*, 37 N. Y. 626. See, as to enforcing the liability of stockholders in a foreign corporation, *Erickson v. Nesmith*, 15 Gray, 221; s. c. 4 Allen, 233; s. c. 46 N. H. 371.

<sup>4</sup> See §§ 242-244.

<sup>5</sup> *Mason v. Pewabic Min. Co.*, 133 U. S. 50.

<sup>6</sup> *Fogg v. Blair*, 139 U. S. 118; 134 U. S. 276.

The subject of stock is considered at more or less length in general works on corporations. The reader is re-



## CHAPTER X.

### PATENTS AND COPYRIGHTS.

§ 518. **General Policy of Patent and Copyright Laws.** — The wise policy of promoting the progress of science and useful arts “by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries,” was favored in this country at the time when the Constitution of the United States was framed; and to Congress was granted by that instrument the power of regulating and enforcing such a policy. The power thus conferred has since been exercised by Congress to the exclusion of the State legislatures. Accordingly we have for inventors *patent rights*, and for authors a system of *copyrights*, — pecuniary interests often of great value, which are in the nature of incorporeal rights, and constitute each a species of personal property.<sup>1</sup>

Letters-patent evince the title of the inventor, and these are issued from the Patent Office under the Commissioner’s seal; but an author’s title is less formally exhibited, while his right is a corresponding one in the main. In either case, the party, who seeks that exclusive enjoyment of the writ-

ferred to the general treatises of Angell & Ames, Morawetz, Henry O. Taylor, and G. W. Field, accordingly; also to Mr. S. D. Thompson’s extensive treatise on Corporations (six volumes), which is in course of publication (1895). All of these are American works, with references to both English and American decisions.

<sup>1</sup> Where tangible property comes into existence by virtue of an invention or discovery for which letters-patent issue, its use is, to the same extent as that of other species of

property, subject within the several States to the exercise of their powers over domestic affairs, whether of internal commerce or of police. *Patterson v. Kentucky*, 97 U. S. 501. A State tax or license law may apply to the tangible property in which the invention or discovery is embodied. *Webber v. Virginia*, 103 U. S. 344.

The government of the United States, or of a State, ought to compensate the owner of a patent, if using the patent. *James v. Campbell*, 104 U. S. 356.

ing or discovery which alone makes it valuable property as against the world, complies with certain legal requirements, and in return is allowed for a certain number of years the sole right to this product of his brain which otherwise would have belonged to the public. For neither an inventor nor an author, here or abroad, has any exclusive right of property in his invention or writing, after publishing it, except under and by virtue of the statutes, foreign or domestic, securing it to him, and in accordance with the regulations and restrictions of those statutes.<sup>1</sup>

§ 519. *Patents first to be considered; Subjects patentable.* —

I. Taking up first in order the subject of patents, which has grown in this country to be of immense importance, — affording abundant business, both for solicitors of letters-patent before the Patent Office and counsel in cases of conflicting rights before the courts, — let us see what subjects may be patented under our laws. The act of 1870 declares that “any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by the law, and other due proceedings had, obtain a patent therefor.”<sup>2</sup>

<sup>1</sup> See 137 U. S. 41.

<sup>2</sup> Act July 8, 1870, § 24. See also U. S. Rev. Stat. (1878) §§ 4883–4936. The code expression of 1878 is given in the text above. Language to much the same effect is to be found in former acts of Congress on this subject; but in this act of 1870 the patent, copyright, and trademark laws of the United States are revised, consolidated, and amended, and some verbal changes have been introduced. The patent law of the United States is the offspring, in a

measure, of that of Great Britain. The English patent law is somewhat different from ours, though in some respects giving rise to a corresponding exposition of legal principles. The foundation of the modern English patent law appears in a negative provision in the Statute of Monopolies, passed during the reign of James I. (21 Jac. I. c. 8) curtailing the power of the crown to grant monopolies, but excepting letters-patent and grants of privilege of the “sole working or making of any manner of new

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What, then, is the legal significance of these terms,—“art,” “machine,” “manufacture,” and “composition of matter”? This phraseology appears in the former patent acts, and the terms have already received judicial construction. “Art” is a word of rather broad signification, and may be said to include an invention or discovery where the particular apparatus or materials employed are not essential, but rather the use of apparatus or materials in new processes, method, or relations.<sup>1</sup> The word “machine” is more limited in its application; and a function or mode of operation embodied in mechanism designed to accomplish a particular effect, as distinguished from a mere function or abstract mode of operation, is a machine under the patent laws.<sup>2</sup> A “manufacture” is literally anything made by the hand of man, and in this sense the English law applies it; but the courts in this country appear to regard a manufacture as something apart from machinery,—fabrics or substances, in fact, made by man’s industry or art, not being machinery.<sup>3</sup> A “composition of matter” includes medicines, compositions used in the arts, and other combinations of substances intended to be sold separately.<sup>4</sup>

§ 520. **Novelty and Utility essential to the Invention or Discovery.**—But, according to the statute, the person who seeks a patent must have invented or discovered a new and useful art, machine, &c., or else a new and useful improve-

manufactures,” &c. There are various later statutes on the subject, of no vital consequence, cited in Fisher’s *Harr. Dig.* “Patent.” The crown has always exercised a control over the trade of the country, and, though restrained by common law and the Statute of Monopolies, might grant within reasonable limits the exclusive right to trade with a new invention for a reasonable period. *Caldwell v. Vanvliessengen*, 9 Hare, 428.

The British courts, unlike ours, construe an introducer as well as an originator to be an inventor. *Simonds Summary of Patents*, c. 1.

<sup>1</sup> See *Curt. Pat.* 3d ed. §§ 9–19, and cases cited; *McClurg v. Kingsland*, 1 How. 204; *Corning v. Burden*, 15 How. 252.

<sup>2</sup> *Curt. Pat.* §§ 20–24; *Blanchard v. Sprague*, 3 Sumn. 535; *Boulton v. Bull*, 2 H. Bl. 463; *Seymour v. Osborne*, 11 Wall. 516. A mere abstract principle or idea is not patentable, for the machine is a concrete thing. *Burr v. Duryee*, 1 Wall. 531; *Case v. Brown*, 2 Wall. 320.

<sup>3</sup> *Curt. Pat.* §§ 25–27.

<sup>4</sup> *Ib.* §§ 28, 29.

ment thereof. Two points, then, are essential to a sufficiency of invention, — *novelty* and *utility*; and this holds true whether in relation to the original thing itself or to any improvement on the original thing.

The requirement of novelty is satisfied if the subject-matter of the thing for which a patent is asked be substantially different from what has gone before; and in determining this question the rule has been to consider the character of the result reached, and not the apparent amount of skill, ingenuity, or thought exercised. A combination of materials may be substantially new, although each ingredient has often been used for other purposes; and, as Judge Story has observed, though a combination may be apparently very simple, "the simplicity of an invention, so far from being an objection to it, may constitute its great excellence and value."<sup>1</sup> Still, however, to distinguish the patentable from the unpatentable in respect to novelty is often a matter of extreme difficulty. To apply an old contrivance to a new use, or make double application of some old mode, or to combine old elements of various earlier devices for the old functions, is unpatentable; as where one uses an apparatus by which the back of a rocking-chair can be placed at any desired angle, the same apparatus having long been applied to other things than chairs for a like purpose: or where the sole change in making door-knobs consists in substituting porcelain for wood or iron;<sup>2</sup> or in using iron alone where wood and iron were formerly united.<sup>3</sup> But to produce a new and beneficial result, as in the process of printing notes by steel plates where copper plates were formerly used, is held to give a claim to a patent.<sup>4</sup> A new process of manu-

<sup>1</sup> Story, J., in *Ryan v. Goodwin*, 3 Sumner, 514, 518.

<sup>2</sup> See *Hotchkiss v. Greenwood*, 11 How. 248; *Bean v. Smallwood*, 2 Story, 408; *Curt. Pat. §§ 49-54*.

<sup>3</sup> *Hicks v. Kelsey*, 18 Wall. 670. Here the purpose was the same, also the means of accomplishment, and the form of the thing and mode of

operation. See also 134 U. S. 388; 135 U. S. 227; 148 U. S. 547.

<sup>4</sup> *Kneass v. Schuylkill Bank*, 4 Wash. 9. See also, on novelty, *Curt. Pat. §§ 41-81*, and cases cited; *Booth v. Kennard*, 38 E. L. & Eq. 457; *Le Roy v. Tatham*, 14 How. 156; 22 How. 132; 151 U. S. 139.

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facture, in truth producing a different article in combinations and decidedly different and advantageous results, is thus to be distinguished from that which is unpatentable.<sup>1</sup> And the Supreme Court of the United States has ruled that changes in the construction and operation of an old machine, so as to adapt it to a new and valuable use which the old had not, are patentable.<sup>2</sup> Mere reduction of cost or the use of superior materials would not appear to satisfy the requirement of novelty; and yet such considerations have sometimes carried considerable weight where a new result was produced from old materials. It is the invention of what is new, and not the arrival at comparative superiority or greater excellence in that which was already known, which the law protects by patent as exclusive property.<sup>3</sup> Nor is it enough that a thing is new, in the sense that in the shape or form in which it has been produced it has not been known; but (besides being useful) the thing must have been invented or discovered.<sup>4</sup>

<sup>1</sup> Mr. Justice Bradley in *Hicks v. Kelsey*, *supra*; 148 U. S. 556. A new article in commerce is not necessarily patentable; the changed article must be more or less efficacious or possess new properties by a combination with other ingredients. See *Glue Company v. Upton*, 97 U. S. 3.

<sup>2</sup> *Seymour v. Osborne*, 11 Wall. 516. See *Tucker v. Spalding*, 13 Wall. 453; 155 U. S. 597.

<sup>3</sup> Mr. Justice Swaine, in *Smith v. Nichols*, 21 Wall. 112, observes: "A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. . . . But a mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention

as will sustain a patent." Here a well-known textile fabric was produced with higher finish and greater beauty of surface, the result apparently of greater tightness in weaving. Rubber-tip pencil held not a new invention. *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498; *Reckendorfer v. Faber*, 92 U. S. 347; 152 U. S. 100. The bringing together several old devices (as in a stove) without producing more than an aggregate of old results, is not patentable. *Hailes v. Van Wormer*, 20 Wall. 354. Where a patent is for an entire process made up of several constituent steps or stages, the patentee not pretending to be inventor of those constituents, his claim does not secure the exclusive use of the constituents singly, but their use when arranged in the process. *Mowry v. Whitney*, 14 Wall. 620.

<sup>4</sup> *Burt v. Evory*, 133 U. S. 349; 132 U. S. 693. On the whole, the tendency of the Supreme Court de-

As to the second requirement, of utility, this does not go so far as to render a preliminary investigation necessary into probable profits or the extent of probable employment of the patented article ; but the question is, whether the thing may be applied to some use beneficial to society, as distinguished from an invention which is injurious to the morals, the health, or the good order of society. Provided the invention be not absolutely frivolous or insignificant, it is almost invariably "useful" within the meaning of our patent acts, save so far as it has some tendency positively mischievous and injurious.<sup>1</sup> While the extent to which a patented device has gone into use affords an unsafe criterion of patentability, especially where its popularity was due to no patentable feature, this extent of general use and the displacement of other devices is entitled to weight in a doubtful case, as tending to show utility, and even perhaps novelty, sufficient to uphold a patent.<sup>2</sup> So, under like qualification, may the invention of what does more work and at less expense than devices before it furnish an important circumstance for judicial consideration.<sup>3</sup>

§ 521. **No Public Use for Two Years prior to the Claim.** — But, again, the supposed invention, according to the act of 1870, must not have been known or used by others in this country and not patented or described in this or any foreign country before the alleged discovery or invention, and not in public use or on sale for more than two years prior to the application.<sup>4</sup> That which infringes a patent if later in date,

cisions (1884) appears to be to restrict the right of claiming a patent as for novelty of invention ; and doubts are cast upon the validity of many patents which have issued from the Patent Office in years past. But (1895) the latest cases incline to turn the scale in favor of upholding an invention where the article has gone into general use, displacing other analogous devices. *Krementz v. Cottle Co.*, 148 U. S. 556 ; 148 U. S. 674 ; 151 U. S. 139 ; 158 U. S. 68.

<sup>1</sup> See *Story, J.*, in *Bedford v. Hunt*, 1 Mas. 302 ; *Curt. Pat.* §§ 105, 106 ; *Bright. Fed. Dig. "Patents,"* 2, and cases cited ; *Abb. Nat. Dig. "Patents,"* 3. And see *Seymour v. Osborne*, 11 Wall. 516.

<sup>2</sup> *Keystone Co. v. Adams*, 151 U. S. 139 ; 141 U. S. 419 ; 149 U. S. 216.

<sup>3</sup> 140 U. S. 55 ; 148 U. S. 482.

<sup>4</sup> *Supra*, § 519. See *Curt. Pat.* §§ 85-88 ; *Gayler v. Wilder*, 10 How. 477.

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anticipates it if earlier; and to show that the invention claimed was patented or described in some printed publication earlier is a sufficient defence against an infringement suit.<sup>1</sup> Absolute novelty, if estimated with reference to all ages and all countries, would be rarely attainable; for the further we explore into the customs of other nations of ancient or modern times, the more we find that what seems new to us was old to them, and that many of our so-called discoveries consist merely in the revival of some lost art.

**§ 522. Patent of a Foreign Invention.** — Under certain conditions, a foreign invention may be patented in this country; and no patent shall be declared invalid under our statutes because of any prior patent obtained abroad, provided the same shall not have been introduced into public use in the United States for more than two years prior to the application; though there are certain requirements, besides, as to the expiration of the term of the patent thus applied for.<sup>2</sup> A foreign patent or publication describing an invention, unless published anterior to the making of the discovery or invention secured by letters-patent issued by the United States, is no defence.<sup>3</sup>

**§ 523. Abandonment or Public Dedication of One's Invention.** — It is thus manifest that a public use or sale in this country for more than two years before the patent is applied for may prove fatal to the inventor's claim, whether a prior patent is obtained abroad or not. This is because the law infers a legal abandonment of the invention or discovery after such a lapse of time. There may be an abandonment before application for letters-patent, or an abandonment after the letters-patent have been granted; and in either case the public enjoy the benefits of the discovery, just as though there were no patent laws in existence. An inventor may, and frequently does, allow the use of his invention by individuals for any period not exceeding two years before he puts in his application, and still retain the right to a valid patent; but he

<sup>1</sup> *Miller v. Eagle Man. Co.*, 151 U. S. 186; 140 U. S. 481.

<sup>2</sup> See *Elizabeth v. Pavement Co.*, 97 U. S. 126.

<sup>3</sup> See Act July 8, 1870, § 25.

must be careful not to exceed this period. Nor, under any circumstances, should he do such acts as virtually amount to a general abandonment and free dedication of the invention to the public; for such acts of themselves, if proved, deprive him of his exclusive right to the invention, though the two years have not expired.<sup>1</sup>

Abandonment after an invention rests on the general equity principle that a claimant will not receive extraordinary aid from the court if he unreasonably delays asking for it, or encourages or acquiesces in any infringement of his rights.<sup>2</sup>

The alleged prior inventor, in order to intercept one who gets hold of the invention and surreptitiously secures the first patent, must have used reasonable diligence in adapting and perfecting his invention, so as to keep clear of any presumed abandonment on his part. Yet our courts are disposed to favor the true inventor as far as they safely may. And it is well settled that the mere forbearance on an inventor's part to apply for a patent during the progress of experiments, and until he has perfected his invention and tested its value by actual practice, affords no just grounds for any presumption that he has abandoned his invention, and surrendered or dedicated it to the public.<sup>3</sup> Nor will his silence, or open acts or conduct, so far as they have not caused injury to others, be construed to his own detriment under such circumstances.<sup>4</sup> Justifiable causes of delay in applying for a patent are fairly considered in such cases.<sup>5</sup> But a patentee may claim the whole or only part of his invention; and by claiming only

<sup>1</sup> See *Curt. Pat.* §§ 102, 103, 381-399; *McClurg v. Kinsland*, 1 How. 202; *Suffolk Co. v. Hayden*, 3 Wall. 315. There may be an abandonment or dedication to the public use, though but one machine be permissively used by one person. *Egbert v. Lippmann*, 104 U. S. 333. And see *Worley v. Tobacco Co.*, 104 U. S. 340; 140 U. S. 355. Long acquiescence in the grant of a patent to another infers abandonment. 119 U. S. 664.

<sup>2</sup> See *Curt. Pat.* § 440; *Abb. Nat. Dig. "Patents,"* 9.

<sup>3</sup> *Agawam Co. v. Jordan*, 7 Wall. 583.

<sup>4</sup> *Railroad Company v. Dubois*, 12 Wall. 47. An inventor must, however, comply with statutory conditions. He should not unreasonably hold his application pending during a long period of years. 101 U. S. 479. Cf. 98 U. S. 31.

<sup>5</sup> 122 U. S. 71.



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a part he is presumed to have abandoned the residue to the public.<sup>1</sup>

§ 524. Priority among Conflicting Claimants of a Patent. —

As to the person entitled to a patent, where there are conflicting claimants, the settled rule is, that whoever first brings a machine to perfection, and makes it capable of useful operation, is the real inventor, and entitled to the patent, although others may previously have had the idea, and made some experiments towards putting it in practice.<sup>2</sup> And while it is true that persons employed are entitled to their own independent inventions, as well as their employers, it is also a rule that where the employer has conceived the plan of an invention, and is engaged in experiments to perfect it, no suggestions from an employee, not amounting to a new method or arrangement which in itself is a complete invention, will suffice to deprive the employer of the exclusive property in the perfected improvement.<sup>3</sup>

§ 525. Proceedings for procuring a Patent. — The proceedings requisite in order to obtain a patent are next to be considered. According to our statutes, the inventor or discoverer must make a written application to the Commissioner of Patents, and file what is commonly known among professional men as a *specification*; or, to use the words of our Patent Act of 1870, "a written description" of the invention or discovery, "and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same." And it is further provided that, "in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and shall particularly point out and distinctly

<sup>1</sup> *McClain v. Ortmyer*, 141 U. S. 419.

<sup>2</sup> *Agawam Co. v. Jordan*, 7 Wall. 583.

<sup>3</sup> *Ib.* And see 149 U. S. 315. The

government cannot appropriate without compensation a man's property invested in a patent, although the inventor was in the government employ. 137 U. S. 342.

claim the part, improvement, or combination which he claims as his invention or discovery." This specification and claim is to be signed by the inventor, and attested by two witnesses.<sup>1</sup> The applicant likewise furnishes a drawing, specimen, or model, as the case may be, to illustrate his claim; and, finally, he must make oath or affirmation that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement for which he solicits a patent; that he does not know, and does not believe, that the same was ever before known or used; stating, also, of what country he is a citizen.<sup>2</sup> So much for the claimant's papers, which, of course, he must not file without paying to government the preliminary fee in advance. But, on his compliance with all these formalities, his claim is taken up and considered at the Patent Office in Washington; and if, on examination, it appears that the claimant is justly entitled to a patent, the Commissioner will issue the letters-patent accordingly; not, however, without requiring him to pay a final fee to government according to law.<sup>3</sup>

§ 526. **The Same Subject; Specifications.** — The preliminaries, then, are simple enough, except as to preparing the specification. Here it is that legal knowledge and scientific aptitude are most severely tested; for a badly drawn specification, such as claims too much, or not enough, or the wrong thing, may defeat the wishes of the inventor altogether, and

<sup>1</sup> Act July 8, 1870, § 26. The claim is a statutory requirement, prescribed for the purpose of making the inventor define precisely what his invention is. 134 U. S. 388. Distinct and formal claims are necessary to ascertain the scope of the invention. 148 U. S. 547. The claim is to be construed in connection with the explanation contained in the specification; but specifications and drawings are only explanatory, and cannot be used to enlarge the claim. 141 U. S. 419; 134 U. S. 388. The Commissioner has considerable latitude to correct or require modifica-

tion of the claim. 133 U. S. 360; 145 U. S. 156.

<sup>2</sup> *Ib.* §§ 27-30. And see U. S. Rev. Sts. (1878) §§ 4888-4890. See *Godfrey v. Eames*, 1 Wall. 317; *Suffolk Co. v. Hayden*, 3 Wall. 315. As to the date of application, see 143 U. S. 275. The oath must be made by the inventor. 128 U. S. 667.

<sup>3</sup> There are other patent-fees imposed in sundry instances, which it is not our purpose to detail,—the grand aggregate going to swell the receipts of the treasury, and tending to make the Patent Office an institution practically self-supporting. See Act July 8, 1870, §§ 31, 68, 69.

render the letters-patent, even though he secure them, mere worthless paper. In the United States the specification is referred to in the patent itself when granted, a copy being always annexed ; and thus our rule, unlike that prevalent in England, is to construe patent and specification together, in order to ascertain the subject-matter of the invention ; and the same is true of drawings annexed to the specification. Hence, the general terms of the patent, of which these form a part, may be controlled by the specification and its accompanying drawings.<sup>1</sup>

The leading objects of a specification are two, as writers on patent-law have shown : *first*, to inform the public what the thing really is of which the patentee claims to be the inventor and (during the existence of his patent) the exclusive owner ; *second*, to enable the public, from the specification itself, to practise the invention so described after the patent has expired.<sup>2</sup> To meet the first object, the specification ought to clearly present the subject-matter of the discovery or invention, — not, indeed, with technical or scientific exactness necessarily, but in language reasonably accurate ; distinguishing between the old and new with fulness sufficient to enable the court to understand what he claims to have first introduced, and avoiding that ambiguity and darkness of description, or misuse of terms, which, wherever found, most likely indicates that the patentee or his attorney groped in the dark for some patentable feature, without a clear idea whether the thing would bear a patent or not.<sup>3</sup> To meet the second object, he should not omit any step or process in his specification which facilitates description, though in a long and complicated process this legal requirement would doubtless be liberally construed ; he should make no false statements ; nor should he so far conceal as in effect to cover up, instead of display, his invention, as an inventor is often

<sup>1</sup> Act 1870, § 22 ; Curt. Pat. §§ 219–221, and cases cited ; Hogg v. Emerson, 6 How. 478 ; Turrill v. Michigan, &c. R. R., 1 Wall. 491.

<sup>2</sup> Curt. Pat. § 228 ; Phillips Pat. 237 ; Evans v. Eaton, 7 Wheat. 356.

<sup>3</sup> Curt. Pat. §§ 229–250, and cases cited ; Prouty v. Ruggles, 16 Pet. 336 ; O'Reilly v. Morse, 15 How. 62 ; Blanchard v. Sprague, 2 Story, 164 ; Bright. Dig. " Patents."

strongly tempted to do where pecuniary success may depend largely on secrecy as to his process; and, in brief, the language of the specification should be such as to enable persons skilled in the particular art or science to apply the invention for themselves, without invention or addition of their own, or even repeated experiments.<sup>1</sup> What the drawings or model might suggest is no part of the invention, apart from what the specification intended.<sup>2</sup>

§ 527. **Patents; how issued; their Tenor.**—In this country, letters-patent — or patents, as they are usually called — are issued in the name of the United States of America, under the seal of the Patent Office. They are signed by the Secretary of the Interior and countersigned by the Commissioner of Patents. And under existing statutes, patents are granted for the term of seventeen years to the patentee, his heirs or assigns, and confer “the exclusive right to make, use, and vend” the invention or discovery throughout the United States and the Territories thereof. Every patent dates as of a day not later than six months from the time at which it was passed and allowed, and notice sent to the applicant or his agent.<sup>3</sup> Whether an invention or improvement should be embraced in one, two, or more patents, is a matter of discretion with the head of the Patent Office.<sup>4</sup>

§ 528. **Legal Title to Letters-Patent; Heirs, Assignees, and Licensees.**—The right, it is seen, is in the patentee, “his

<sup>1</sup> See Curt. Pat. §§ 252-261, and cases cited; *Wood v. Underhill*, 5 How. 1. Thus, where a patent is claimed for a discovery of a new substance, by means of chemical combinations of known materials, it should state the component parts of the new manufacture claimed with clearness and precision, and not leave the person attempting to use the discovery to find it out by experiment. *Tyler v. Boston*, 7 Wall. 327. The scope of letters-patent must be limited to the invention covered by “the claim;” and the latter cannot be enlarged by the language used in other parts of the specification. *Railroad Co. v.*

*Mellon*, 104 U. S. 112. As to sufficiency of expression in a specification, see *Loom Co. v. Higgins*, 105 U. S. 580; *Carlton v. Bokee*, 17 Wall. 463. *Telephone Cases*, 126 U. S. 1. A specification is sufficiently clear and descriptive when expressed in terms intelligible to a person skilled in the art to which it relates. 152 U. S. 561.

<sup>2</sup> 127 U. S. 563.

<sup>3</sup> See Act July 8, 1870, §§ 21-23. All officers designated by the statute must sign, or the letters are void. 128 U. S. 605.

<sup>4</sup> *Bennet v. Fowler*, 8 Wall. 445.

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heirs or assigns." So far are the rights of heirs and assigns protected, that if the inventor dies before the patent is granted, the right of applying for and obtaining the patent will devolve on his executor or administrator, in trust for his heirs-at-law, — or otherwise, in accordance with his testamentary disposition; and if the right has been assigned by the inventor before the patent is granted, the patent may be granted and issued and reissued to the assignee, provided the assignment be first recorded in the Patent Office; though the claim papers should be executed by the inventor himself if he be alive.<sup>1</sup> It is thus evident that the patentee is frequently a different person from the inventor. The patentee, of course, holds the legal title to the patent; and when the inventor's assignee has the patent issued to himself, the exclusive right is vested in the assignee as a legal estate, and the inventor is divested of the legal title. Where a patent is granted to one as executor, he can maintain a suit on the patent in all respects as if he had been designated in the patent as trustee instead of executor.<sup>2</sup> If the patent be void, it is void as to the assignee as well as the inventor.<sup>3</sup> The title to a patent passes to the patentee's assignee in bankruptcy, subject to the latter's election to accept it.<sup>4</sup> But the patent monopoly is an entire right, and cannot be divided up by assigning separate claims under the same patent.<sup>5</sup>

The exclusive right conferred by the patent is "to make, use, and vend" the invention. It is specially provided by statute that not only the patent, but any interest therein, shall be assignable in law by an instrument in writing; and in this manner may be granted an exclusive right under the patent to the whole or any specified part of the United States; but such assignment or grant shall be void as against any subsequent purchaser or mortgagee for a valuable con-

<sup>1</sup> Act July 8, 1870, §§ 33, 34. See Curt. Pat. §§ 167-174; Gayler v. Wilder, 10 How. 477.

<sup>2</sup> Rubber Co. v. Goodyear, 9 Wall. 788. See Abb. Nat. Dig. "Patents,"

<sup>5</sup> And see, as to rights of assignee, Littlefield v. Perry, 21 Wall. 205.

<sup>3</sup> Worley v. Tobacco Co., 104 U. S. 340.

<sup>4</sup> 145 U. S. 29.

<sup>5</sup> Pope Man. Co. v. Gormully Mfg. Co., 144 U. S. 248; 138 U. S. 252.

sideration without notice, unless recorded in the Patent Office within three months from its date.<sup>1</sup> Thus, then, a patent-right may be assigned after the issue of letters, as well as before, on compliance with certain requirements of law; though as to the extent of the right thus transferred and the mutual relations of assignor and assignee there is still some uncertainty. One point, however, which was formerly in doubt, seems to have been well established by the decisions of the Supreme Court of the United States: and this is, that the patentee's assignment or grant of an extension or renewal of a patent, before any extension has issued, will carry, if the terms of the grant be proper ones, the legal as well as the equitable interest in the patent; and that by a sweeping transfer of all his property both patent-rights and extensions thereof may pass.<sup>2</sup>

But the decisions in our courts recognize a distinction between the right to make and vend and the right to use a patent. And there is a kind of contract to which a patentee often makes himself a party, namely, a license to use the patent; and this is obviously different from an assignment or grant of the right; for the entire monopoly "to the whole or any specified part of the United States" is not thereby

<sup>1</sup> Act July 8, 1870, § 36; U. S. Rev. Sta. § 4898. See *Curt. Pat. § 182 et seq.*; *Pitts v. Whitman*, 2 Story, 609, 614. As against the patentee and third persons not above indicated, the requirement of record within three months appears not essential to the validity of the assignment.

<sup>2</sup> *Railroad Co. v. Trimble*, 10 Wall. 367. And see *Wilson v. Rousseau*, 4 How. 646; *Bloomer v. McQuewan*, 14 How. 539; *Hartshorn v. Day*, 19 How. 211; *Bloomer v. Millinger*, 1 Wall. 340; *Chaffee v. Boston Belting Co.*, 22 How. 217. An assignment of an interest in a patented invention is a contract, and like other contracts should be so construed as to carry out the intention of the parties to it. Mr. Justice Davis in *Nicolson Pave-*

*ment Co. v. Jenkins*, 14 Wall. 452. See, as to the right to assign, 104 U. S. 521. And see 130 U. S. 152.

As to the right of a purchaser from an assignee to use the machine, see *Adams v. Burke*, 17 Wall. 453. The assignment of an exclusive right to use a machine, and to vend it to others for use within a specified territory, authorizes the assignee to vend elsewhere, out of that territory, articles manufactured by the machine. *Simpson v. Wilson*, 4 How. 709. Such transfers are not revocable without cause. 140 U. S. 184. As to correcting a wrongful use by a subsequent purchase of a right to vend, see *Emerson v. Dodge*, 18 Wall. 414.

For the right of a recorded assignee to sue for an infringement, see *Littlefield v. Perry*, 21 Wall. 205.

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granted. Our statutes provide that those who have purchased or acquired by consent the right to construct any newly invented machine before the patent is applied for may use, or sell for use, the specific thing, without incurring liability. And, in order that the rights of patentees and their assigns may be fully protected, patented articles should be marked.<sup>1</sup> The licensee must assert his legal rights in the name of the original owner; he cannot in his own name prosecute for infringement.<sup>2</sup> A license to use an invention implied from circumstances is not transferable unless the patentee waives his own rights.<sup>3</sup> Nor is an oral license to use available against a subsequent assignee of the patent without notice.<sup>4</sup>

§ 529. *Caveat, Surrender, Reissue, and Disclaimer.* — Where the inventor desires time to mature his invention he will do well to file a *caveat*. Our statutes provide that any citizen of the United States (and, upon certain conditions, an alien resident likewise) who makes a new invention or discovery, and desires further time to mature it, may, on payment of the fees, file in the Patent Office a *caveat*, setting forth the design thereof, and praying protection of his right until he shall have matured his invention. This *caveat* is filed in the confidential archives of the office; and the effect of its presentation is to protect the inventor a year, against applications which may meantime be presented by other persons.<sup>5</sup>

Then, again, the privileges of surrender and reissue and disclaimer become of importance to the patentee where his original patent claims too much, or is in any respect defective. If a patent be inoperative or invalid, because of some such reason, — the error being honestly made, and not with fraudulent intent, — the patentee may surrender his original patent and have a new one issued for its unexpired term. The object of conferring this power of surrender and reissue

<sup>1</sup> See Act July 8, 1870, §§ 37-39; U. S. Rev. Sta. §§ 4899-4901; Brooks v. Byam, 2 Story, 525; Curt. Pat. §§ 211-218; Abb. Nat. Dig. "Patents," 4; Rubber Co. v. Goodyear, 9 Wall. 788.

<sup>2</sup> Paper-bag Cases, 105 U. S. 766; 138 U. S. 252.

<sup>3</sup> Hapgood v. Hewitt, 119 U. S. 226.

<sup>4</sup> 153 U. S. 332.

<sup>5</sup> Act July 8, 1870, § 40; U. S. Rev. Sta. § 4902.

is to enable patentees to remedy accidental mistakes; and the law endeavors to place parties as they would have stood in case the original specification had been made out in the corrected form. But interpolations in a reissued patent, of new features, ingredients, or devices, are not allowable, though parties often try to get reissues from the Patent Office for the purpose of inserting some expanded or equivocal claim.<sup>1</sup> The statute permits of a reissue in divisions; and several reissues may be required to constitute a complete machine, and on a proceeding for infringement these may be introduced in one bill.<sup>2</sup> The error to be corrected may be either that of specification or claim, it matters not which; and the patentee has a right to restrict or enlarge his claim, so as to give it validity and carry out the purposes of the invention.<sup>3</sup>

Specifications may also be amended by filing a disclaimer at the Patent Office, whenever through inadvertence, accident, or mistake, and without fraudulent intent a patentee has claimed more than that of which he was the original or first inventor. The patent, in this case, is valid for all that part which is justly and truly his own, provided it be a material or substantial part of the thing patented. This disclaimer is to be in writing and attested, and it should be recorded, — all in accordance with the statute requirements; and it is then considered a part of the original specification to the extent of the interest of the claimant and those claiming under him

<sup>1</sup> See Act July 8, 1870, § 53; U. S. Rev. Sta. § 4916; Act March 24, 1871; *Eureka Company v. Bailey Company*, 11 Wall. 488; *Burr v. Duryee*, 1 Wall. 531; *Curt. Pat.* §§ 279-285; 158 U. S. 366; 150 U. S. 38.

<sup>2</sup> *Eureka Company v. Bailey Company*, *supra*.

<sup>3</sup> See *Battin v. Taggart*, 17 How. 74; *Rubber Co. v. Goodyear*, 9 Wall. 788; *O'Reilly v. Morse*, 15 How. 62. And as to surrender after an extension, see *Wilson v. Rousseau*, 4 How. 646. Reissued letters-patent are void if they embrace a broader claim than

that for which the original letters were issued. *Manufacturing Co. v. Corbin*, 103 U. S. 786; 104 U. S. 350; 106 U. S. 39, 142; *Carlton v. Bokee*, 17 Wall. 463. As to reissue for expanding and generalizing a claim not defectively specified, see 104 U. S. 356. And see *Gill v. Wells*, 22 Wall. 1; *Railway Co. v. Sayles*, 97 U. S. 554. A reissued patent is invalid where it is not for the same invention as the original patent; but makes new or expanded claims and shows no inadvertence, accident, or mistake when corrected. 139 U. S. 481; 145 U. S. 226; 137 U. S. 258.



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after the record. But no disclaimer shall affect any action pending at the time when it was filed, except so far as may relate to the question of unreasonable neglect or delay in filing it.<sup>1</sup>

§ 530. **Rule as to Extension of Patents.**—The policy of Congress has varied considerably with regard to the extension of patents. By the act of 1836, the Secretary of State, the Commissioner of the Patent Office, and the Solicitor of the Treasury were constituted a Board of Commissioners to hear evidence, and decide upon granting an extension of the term of any patent, where such extension was paid for; and the question for their consideration was whether, having due regard to the public interest therein, it was just and proper to grant the extension, because the patentee had failed to obtain a reasonable remuneration. Upon their favorable decision the patent was to be extended for seven years beyond its original expiration. As the duties of government officers increased, it became necessary to change the board; and Congress, by the act of 1848, vested the sole power of extension in the Commissioner of Patents.

But the arbitrary power thus exercised by a department officer became obnoxious; and the more the patent business grew, the greater became the danger that improper influences would be brought to bear upon an officer who already was burdened with duties; and there were good reasons, besides, for leaving all patents to expire at the same reasonable period, subject to such redress in special instances as might be furnished by legislation. Hence Congress, by the act of 1861, extended the original term from fourteen to seventeen years, as it now remains, and prohibited all extensions of patents to be granted in the future. No patent granted since the 2d of March, 1861, can lawfully be extended.<sup>2</sup> But Congress may, and frequently does, authorize by special act the

<sup>1</sup> Act July 8, 1870, § 54; U. S. Rev. Stat. § 4917; Abb. Nat. Dig. "Patents," § 6. See *Leggett v. Avery*, 101 U. S. 256; *Smith v. Nichols*, 21 Wall. 112; 145 U. S. 29; 180 U. S. 56. A disclaimer cannot be used to change the character of the invention. 123 U. S. 582; 130 U. S. 56.

<sup>2</sup> See *Curt. Pat. § 287*; Act March 2, 1861, c. 88, § 16; Act July 8, 1870, §§ 22, 63-67.

extension of a patent; and such legislation avails, as it would appear, even though the invention may have already been introduced to public use.<sup>1</sup> Extended or reissued letters-patent cannot be annulled in any collateral proceeding for fraud.<sup>2</sup>

§ 531. **Appellate Proceedings for obtaining a Patent.** — There is a sort of special procedure in the matter of obtaining letters-patent, by which the controversy may sometimes be brought into the courts, though originating in an executive department. The rules applicable in such cases are fully detailed by statute; and the right secured to the applicant for a patent or its reissue is substantially that of an appeal, in case he is dissatisfied, from the primary examiner to a board of examiners-in-chief; from this board to the Commissioner in person; and from the Commissioner in person to the Supreme Court of the District of Columbia sitting *in banc*. And, finally, the applicant, if his patent be still refused, may resort to a bill in equity. Cases of interference, where application is made for a patent which appears to interfere with any pending application, or with any unexpired patent, are subject to a like right of appeal.<sup>3</sup> The law prescribes, further, how far copies of records and foreign patents shall be admissible in evidence.<sup>4</sup>

The decision of the Commissioner of Patents in the allowance and issue of a patent creates a *prima facie* right only;<sup>5</sup> and upon all the questions involved therein, the validity of the patent is subject to judicial examination,<sup>6</sup> which should be searching on the issue of patentable invention.<sup>7</sup>

<sup>1</sup> See Abb. Nat. Dig. "Patents," 10; *Bourne v. Goodyear*, 9 Wall. 811; *Agawam Co. v. Jordan*, 7 Wall. 583.

<sup>2</sup> *Rubber Co. v. Goodyear*, 9 Wall. 788; *Seymour v. Osborne*, 11 Wall. 516. The absolute owner of a patent may use or transfer his rights during an extended term; but the license to use a patent is not presumed to extend beyond the term during which the license was given. *Paper-bag Cases*, 105 U. S. 766. And as to cases of extension, see *Bloomer v.*

*McQuewan*, 14 How. 539; *Bloomer v. Millinger*, 1 Wall. 340; *Wilson v. Simpson*, 9 How. 109; *Rubber Co. v. Goodyear*, 9 Wall. 788; 18 Wall. 414.

<sup>3</sup> See Act July 8, 1870, §§ 41-52; U. S. Rev. Stats. §§ 4909-4915; Abb. Nat. Dig. "Patents," 3; *Seymour v. Osborne*, 11 Wall. 516.

<sup>4</sup> Act July 8, 1870, § 57.

<sup>5</sup> The Commissioner's disallowance of a patent may control in a doubtful case. 153 U. S. 120.

<sup>6</sup> *Reckendorfer v. Faber*, 92 U. S.

<sup>7</sup> *Hill v. Wooster*, 132 U. S. 693.

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§ 532. *Infringement of Patents; Remedies, etc.* — But the great subject of infringement of patents belongs more especially to the courts; and here it is that an injured party has his more important remedies, whether it be by action at law to recover damages, or through the more ample process of a bill in equity. The word "infringement" is used in the patent law to denote the act of trespassing upon the incorporeal right secured by a patent. Any person who, without legal permission, shall "make, use, or vend to another to be used," the thing which is the subject-matter of an existing patent, commits the wrong of infringement. For this wrong the choice is of two remedies, — either damages may be recovered against him at law by an action on the case, or else there may be a bill in equity for an injunction and account.<sup>1</sup> What constitutes an infringement, however, within the meaning of our patent laws, is left mainly for the courts to determine; and upon this point there are a number of decisions in the Circuit and District Courts of the United States, which it is not our purpose to set forth, though they should be carefully examined by every patent lawyer.<sup>2</sup> But, in general, it may be said that, since the wrong consists in making, using, or vending to be used, it is not regarded an infringement to make a patented machine merely as an experiment; nor to vend the materials of a patented machine; nor to sell the articles which it may have produced, unless the patent covers both process and product; nor, where the proportions of certain ingredients are essential, to vary them.

What constitutes infringement of a machine is not determinable by fixed rules; but it may arise where the invention is used without such variation as constitutes a new discov-

347. As to suits for annulling a patent, see *Mowry v. Whitney*, 14 Wall. 434. The grant of letters-patent does not conclude the question of abandonment. 101 U. S. 479. Courts should not unreasonably by construction enlarge the claim which the Patent Office has admitted. 100 U. S. 671.

<sup>1</sup> See Curt. Pat. c. 8; Bouv. Dict. "Infringement;" U. S. Rev. Stats. §§ 4918, 4919.

<sup>2</sup> See Curt. Pat. c. 8, *passim*; Bright. Fed. Dig. "Patents," 12; Abb. Nat. Dig. "Patents," 9.

ery; and here the doctrine of mechanical equivalents is properly applicable. In a manufacture the question is one of substantial identity, and so with any applied principle.<sup>1</sup> Nothing can be held an infringement of a patent which does not fall within the terms in which the patentee has himself chosen to express his invention.<sup>2</sup>

§ 533. **The Same Subject.**—Our statutes provide that damages for the infringement of any patent may be recovered by action on the case in certain specified courts of the United States; such action being brought in the name of the party interested, either as patentee, assignee, or grantee. And it is further declared that whenever, in any such action, a verdict shall be rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.<sup>3</sup> So much for the remedy at law. As to remedies in equity, jurisdiction of patent cases is also conferred on courts of the United

<sup>1</sup> *Ib.* And see *Winans v. Denmead*, 15 How. 330; *Prouty v. Ruggles*, 16 Pet. 336; *Hogg v. Emerson*, 11 How. 587; *supra*, § 520. It has been held by the Supreme Court of the United States that the right covered by a patent does not extend to a foreign vessel lawfully entering one of our ports. *Brown v. Duchesne*, 19 How. 183. *Contra*, English doctrine in *Caldwell v. Van Vlissingen*, 9 E. L. & Eq. 51. See *Keplinger v. De Young*, 10 Wheat. 358. And in an important case the question is considered, how far either the inventor of a device, or of an entire machine, or of a mere combination, can invoke the aid of the doctrine of equivalents. *Seymour v. Osborne*, 11 Wall. 516.

The introduction of a newly discovered element or ingredient, or one not previously known to be an equivalent, would not constitute an infringement. *Gould v. Rees*, 15 Wall. 187. Nor is there an infringement where a

single important element is left out. 150 U. S. 221. But the substantial equivalent of a thing is the same as the thing itself in patent law; and, notwithstanding differences of name and form, there may be an infringement. *Machine Co. v. Murphy*, 97 U. S. 120. See further, § 520. Putting the patented device to some other use, or slightly improving upon it, is an infringement. 129 U. S. 263; 139 U. S. 601.

<sup>2</sup> *McClain v. Ortmyer*, 141 U. S. 419. Where the patentee is the pioneer, his patent deserves liberal construction. 129 U. S. 263; 145 U. S. 29.

<sup>3</sup> Act July 8, 1870, § 59; U. S. Rev. Stats. § 4919. For practice in matters at law, see *Curt. Pat. c. 9*. For the cost or damages recoverable, see *Parks v. Booth*, 102 U. S. 96; *Elizabeth v. Pavement Co.*, 97 U. S. 126.

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States; and upon the filing of a bill in equity by any party aggrieved, the court has power to grant injunction, according to the usual principles, to prevent the violation of a patent-right. The terms in such a case are such as the court may deem reasonable; and the complaining party, if successful, is entitled to recover not only the defendant's profits to be accounted for, but also the damages he may have sustained, which are to be assessed under the direction of the court.<sup>1</sup>

§ 534. **Miscellaneous Points as to Patent Suits.**—As a general rule, patents are liberally construed in our courts, and with a disposition to protect the patentee against every substantial violation of his rights. There is some uncertainty as to the province of court and jury respectively, in determining upon the validity and effect of an invention; but a fair distinction is to be taken between the construction of written instruments (which is a judicial duty) and discrimination as to the character of the thing invented in questions of unity and diversity of invention; and the court need not compare two specifications, and instruct a jury, as matter of law, whether the inventions are or are not identical.<sup>2</sup> The rule of estimating damages in patent suits is now pretty well established. And, as to evidence, rules have been set forth in considerable detail by the Supreme Court.<sup>3</sup> Our patent statutes, in this latter particular, require a defendant who relies upon special matter, such as the previous invention, knowledge, or use of the thing patented, to give thirty days' notice of the names and places of residence of his witnesses; and this requirement is strictly construed.<sup>4</sup>

<sup>1</sup> Act July 8, 1870, § 56; U. S. Rev. Stats. § 4921. For practice in matters in equity, see Curt. Pat. c. 10. And see *Moore v. Marsh*, 7 Wall. 515; and *Digests of Bright and Abbott, supra*. Appeal or error lies in all patent controversies, whether at law or in equity, to the Supreme Court of the United States. Act July 8, 1870, § 56. See *Philip v. Nock*, 13 Wall. 185; § 357.

<sup>2</sup> *Bischoff v. Wethered*, 9 Wall. 812; Curt. Pat. §§ 222-225. The court defines the invention to the jury. 155 U. S. 565.

<sup>3</sup> *Seymour v. Osborne*, 11 Wall. 516; *Rubber Co. v. Goodyear*, 9 Wall. 788; *Railroad Co. v. Dubois*, 12 Wall. 47. See *Tucker v. Spalding*, 13 Wall. 453; *Bates v. Coe*, 98 U. S. 31.

<sup>4</sup> *Blanchard v. Putnam*, 8 Wall.

And that there may be an end of patent controversies, our courts incline strongly to uphold all agreements made between rival patentees upon consideration and for the sake of peace.<sup>1</sup>

§ 535. *Copyright; Statute Protection, etc.* — II. Next, as to that sort of literary property which is known as "copyright," or the "right of copy," by which we mean the sole right of printing, publishing, and selling one's literary composition. Copyright is the creature of statute; and no common-law protection is given to a work of literature or art after it is once published.<sup>2</sup> An author in this country has no exclusive property in his published work except as granted by the Constitution of the United States and the laws of Congress made in pursuance thereof; although he has at common law an absolute property in his work before its publication.<sup>3</sup> And the act of July 8, 1870, as embodied in the Revised Statutes, defines the extent to which copyright is to be recognized and protected in this country. Not only book-writers, but artists, are entitled to the benefits of a literary property; for it is expressly provided that "any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and his executors, administrators, or assigns, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and in the case of a dramatic

420; *Wise v. Allis*, 9 Wall. 737; *Agawam Co. v. Jordan*, 7 Wall. 583.

<sup>1</sup> *Eureka Company v. Bailey Company*, 11 Wall. 488. As between Federal and State jurisdiction all suits directly touching the validity of a patent, or raising a Federal question, should be brought in the United States courts; but a mere contract relating to a patent is not necessarily

of this character. *Marsh v. Nichols*, 140 U. S. 344; 125 U. S. 46, 54.

<sup>2</sup> *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Reade v. Conquest*, 9 C. B. n. s. 755.

<sup>3</sup> *Wheaton v. Peters*, 8 Pet. 591. See *Kerr Injunctions*, cs. 13, 20; *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Prince Albert v. Strange*, 1 Mac. & G. 25; 3 Cliff. 537.

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composition, of publicly performing or representing it, or causing it to be performed or represented by others ; and authors may reserve the right to dramatize or to translate their own works."<sup>1</sup>

§ 536. *The Same Subject; Legal Principles.* — The law of copyright has received, as yet, no great attention from the Supreme Court of the United States ; but many interesting questions are discussed in the lower federal tribunals ; the decision turning considerably upon the construction of statutes, which of course are liable to amendment. Some doctrines appear to be well established ; and among them that neither the official report of a government officer is a subject of copyright, nor a newspaper, nor the republished work of any foreign author.<sup>2</sup> Nor can judges themselves have any pecuniary interest in the fruits of their judicial labors as against the public.<sup>3</sup> But by the common law a person had property in his own manuscripts ; and a court of equity would enjoin the improper use of them by a third party ; and hence, too, the author of letters is allowed to have a property — or, it may be, a copyright — in his own letters, and no person has a right to publish them without his consent, unless the publication be requisite to establish a personal right or claim or for self-vindication.<sup>4</sup> The reporter of a court has no copyright in the written opinions delivered by the judges,<sup>5</sup> although he may as author (unless restrained by statute) obtain a copyright for a volume of reports so as to cover such parts of the book as he prepares.<sup>6</sup> Copyrights, then, are not permitted in the case of certain persons and certain subjects.

But again, there is no copyright where the element of

<sup>1</sup> Act July 8, 1870, § 86 ; U. S. Rev. Stats. (1878) § 4952. Act March 3, 1891, c. 565, amends.

<sup>2</sup> See Abb. Nat. Dig. "Copyright," 1, and cases cited ; Bright. Fed. Dig. "Copyright," 1 ; Act July 8, 1870, §§ 86, 103. See § 541, note.

<sup>3</sup> Not even where the judge prepares the head notes as well as the opinion. *Banks v. Manchester*, 128

U. S. 244. And if the reporter of a court takes out copyright for the State for matter thus prepared, of which he is not the author, no essential right exists.

<sup>4</sup> *Ib.* ; *Kerr Injunctions*, c. 13 ; *Pope v. Curl*, 2 Atk. 342.

<sup>5</sup> *Wheaton v. Peters*, 8 Pet. 591.

<sup>6</sup> *Callaghan v. Myers*, 128 U. S. 617.

originality is wanting in the production. Thus, to constitute one an author, he must by his own intellectual labor applied to the materials of his composition have produced an arrangement or compilation new in itself; and as to any inventor or designer, a similar observation applies; something new must have been brought forth. But exactly where the line should be drawn between a compilation which may be copyrighted and an appropriation of materials which may not, it is difficult to say; except that the plan, arrangement, and combination of materials should be new, or at least that there should be that substantial condensation of original materials which constitutes a *bond fide* abridgment; in short, that a fair degree of intellectual labor and judgment should have been expended by the person on whose behalf a copyright is claimed; and this, we may add, to some new and useful result.<sup>1</sup> The "proprietor" of a work is allowed by our present statute to take out a copyright as well as the author, inventor, or designer; yet the courts have always discouraged such an interpretation of the law as would entitle mere employers to exclusive privileges of this sort.<sup>2</sup>

And again, the author, inventor, or designer of a work for which he might have obtained a copyright, may, under some circumstances, similar to other inventors, be considered to have dedicated his work to the public; though no such dedication is to be readily presumed.<sup>3</sup> The further proposition is well established, that the literary composition intended to be protected is not to be chiefly determined by the

<sup>1</sup> See Bright. and Abb. *supra*; Atwill v. Ferrett, 2 Bl. C. C. 40; Gray v. Russell, 1 Story, 11; Folsom v. Marsh, 2 Story, 100. See Callaghan v. Myers, 128 U. S. 617, where infringement by copying was shown. Copyright is infringed only when the persons produce a substantial copy of the whole, or of a material part of the book or other thing for which copyright was secured. Hence, maps of New York City having been copyrighted upon a certain plan, the publication of maps of Philadelphia upon

a similar plan constitutes no infringement. *Perris v. Hexamer*, 99 U. S. 674. Nor can the author of a peculiar system of book-keeping claim, under his copyright for a treatise on that subject, an exclusive property in the system itself. *Baker v. Selden*, 101 U. S. 99. See, as to the difference between a patent and a copyright, opinion of Mr. Justice Bradley, *ib.*

<sup>2</sup> Act July 8, 1870, § 86.

<sup>3</sup> *Ib.* And see U. S. Rev. Stats. (1878) § 4952.



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title of the work, nor by the size, form, or shape in which it makes its appearance, but rather by the subject-matter which it contains.

§ 537. **Length of Copyright Term.** — The length of time for which copyrights are to be granted has long been twenty-eight years ; with the further right of an extension for fourteen years, which may always be secured by the author, inventor or designer, or his widow or children.<sup>1</sup> And as no copyright existed at common law there is no authority for obtaining copyright beyond the extent to which Congress may have authorized it, generally or specially.<sup>2</sup>

§ 538. **How Copyright is procured.** — The executive supervision of our copyright system belongs now to the Librarian of Congress, at Washington ; though until recently it was vested in the clerks of the various District Courts of the United States. And, in order that a copyright may be perfected, three things are essential on the part of the copyright claimant: *first*, a deposit in the mail, before publication, of the printed title, addressed to the Librarian of Congress (the legal fees being likewise payable); *second*, a deposit, within ten days after publication, of two complete copies of the work (or, in case of a work of art, a photograph of the same); and *third*, by way of public caution against infringement, the insertion or inscription upon each copy of the work of the words, "Entered according to Act of Congress, in the year —, by A. B., in the office of the Librarian of Congress, at Washington." <sup>3</sup>

<sup>1</sup> Act July 8, 1870, §§ 87, 88 ; U. S. Rev. Stats. §§ 4953, 4954. See *Paige v. Banks*, 13 Wall. 608. Amended by Act March 3, 1891, as to formalities of extension, by publication.

<sup>2</sup> *Banks v. Manchester*, 128 U. S. 244.

<sup>3</sup> Act July 8, 1870, §§ 90-97 ; U. S. Rev. Stats. §§ 4956-4959, 4962. See amendments, Act March 3, 1891. Government fees are to be paid in such cases. Cf. statute for full details. And see *Wheaton v. Peters*, 8 Pet. 591. Act June 18, 1874, per-

mits the author to insert or inscribe, at his option, instead of the above notice, the following: "Copyright, 18— by A. B." See further, as to the place of copyright mark on certain works of art, Act Aug. 1, 1882.

The delivery or deposit of two copies of the copyrighted book within ten days after publication is an essential condition to the statute protection. As to the proof of such deposit, by certificate or otherwise, in a suit for infringement, see *Merrell v. Tice*, 104 U. S. 557. Deposit just

§ 539. **Assignment of Copyright.** — Copyrights are made assignable in law by any instrument in writing ; but the assignment, unless recorded in the office of the Librarian of Congress within sixty days after its execution, is void against any subsequent purchaser or mortgagee for a valuable consideration without notice.<sup>1</sup> It is not uncommon for contracts to be made between author and publisher which may amount to an assignment of copyright, or a license to publish, according to circumstances ; and publishers in these days frequently take out the copyright in their own names, a course especially proper in the case of magazines which they, and not the editor or contributors, own.<sup>2</sup>

§ 540. **Infringement of Copyright; Remedies, etc.** — The remedies for the infringement of copyright are not unlike those in the case of patents ; and the injured party may proceed either by bill in equity and obtain an injunction, or by action at common law for damages. The general jurisdiction of controversies arising under the copyright laws belongs to the courts of the United States ; and the rules of pleading, of proceedings on appeal, of damages for infringement (whether the infringement relates to a book, map, engraving, dramatic composition, manuscript, or any other subject of literary copyright), and of limitations, are affected largely by statute provisions.<sup>3</sup> The right of action for infringing copyright, as well as the copyright itself and the means of securing redress, are only those prescribed by Congress.<sup>4</sup>

before publication complies with statute. The three requirements are discussed in *Belford v. Scribner*, 144 U. S. 488 ; *Callaghan v. Myers*, 128 U. S. 617.

<sup>1</sup> Act July 8, 1870, § 89 ; U. S. Rev. Stats. § 4955.

<sup>2</sup> See Bright. Fed. Dig. "Copyright," 4 ; *Little v. Hall*, 18 How. 165.

<sup>3</sup> Act July 8, 1870, §§ 98-108 ; U. S. Rev. Stats. (1878) §§ 4964-4971 ; Bright. *supra*, 5, 6 ; Abb. Nat. Dig. "Copyright," 5. The unauthorized printer and the publisher of a copyrighted book are equally liable

for an infringement ; and both may be required to account for the profits of the unauthorized publication. 144 U. S. 488.

<sup>4</sup> *Thompson v. Hubbard*, 131 U. S. 123. As to damages, see 124 U. S. 612 ; 144 U. S. 488. Where portions only are copied, but so intermingled with the rest of the work as not to be distinguishable, the entire profits may be recovered in a suit. 144 U. S. 488.

For the effect of non-assertion of copyright, see *Paige v. Banks*, 13 Wall. 608.

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§ 541. **English and Foreign Patent and Copyright Laws.** — We have dwelt, in this chapter, more particularly upon the American law of patents and copyrights, because this system is *sui generis*, and not fairly to be compared with that of England and other countries whose statutes are so different from our own. English patent law is founded upon an old "statute of monopolies;"<sup>1</sup> ours draws its inspiration rather from the constitutional policy of promoting the progress of science and useful arts; and there are some nations, such as Holland and Switzerland, whose legislators deem it better to dispense with patent rights altogether.<sup>2</sup> Our copyright laws are frequently criticised as imperfect, inasmuch as they permit of piracy in foreign works;<sup>3</sup> and doubtless an international copyright system, which would fairly secure to authors the just fruits of their toil the world over, is desirable, and may yet be partially reared.<sup>4</sup>

<sup>1</sup> *Supra*, § 519.

<sup>2</sup> See Whitman Pat. Laws, pt. ii., *passim*.

<sup>3</sup> Aliens and non-residents of the United States were not formerly protected under our copyright laws. U. S. Rev. Stats. § 4971. But see new international copyright mentioned in next note. For English law of patents and copyrights, see Kerr on Injunctions, cs. 19, 20; Wms. Pers. Prop. pt. iii. c. 2; Fisher's Dig. "Patents," &c. Trademark protective legislation is held unconstitutional as concerns the United States, and not within the purview of the Federal constitution. Trademark Cases, 100 U. S. 82. Labels simply intended to designate articles cannot be copyrighted. 140 U. S. 428. As to design patents, see *Gorham Co. v. White*, 14 Wall. 511.

The English statute, 8 Anne, c. 19, § 1, gave a copyright in books then printed for twenty-one years, and to authors and their assignees the exclusive copyright for fourteen years; and by § 9, after the expiration of the fourteen years, another similar

period if the author was living. This act was extended to the United Kingdom by 41 Geo. III. c. 107. By later acts the statute of Anne is repealed, and the period of copyright is extended, so as at all events to provide copyright for the full period of an author's life, and seven years later. See 54 Geo. III. c. 156; 5 & 6 Vict. c. 45; Fisher's Harrison's Dig. "Copyright." English copyright is to be entered at Stationers' Hall; and certain public libraries must be supplied with copies in order to make the proprietorship complete. Stat. 5 & 6 Vict. c. 45. By the English law, copyright may be taken out by newspapers or other "serial publications." 40 Ch. D. 500; [1894] 3 Ch. 663. Or in the translation of a foreign play. [1892] 3 Ch. 402. Or for designs. The form of expression in which news is conveyed becomes thus the subject of English copyright. [1892] 3 Ch. 489. As to compiling circular tours, as distinguished from copying mere time-tables, see [1894] App. C. 335.

<sup>4</sup> Since the text was written an

## CHAPTER XI.

## ANNUITIES, PENSIONS, AND INSURANCE POLICIES.

§ 542. **Annuities; their Nature and Incidents.** — I. That species of incorporeal chattel which is known as the “personal annuity” plays rather an important part in English property law; though in America it seems to have attained very little consequence in comparison. Personal annuities are annual or periodical payments of money not charged on real estate, and such payments to a beneficiary are expressed sometimes for years though usually for life. An annuity in general may be charged only upon real estate, or only upon personal; or it may be charged generally upon one’s whole estate, real and personal combined. Annuities are sometimes limited to the “heirs” or “heirs of the body” of the grantee, in which latter case they descend on his dying intestate, just like real estate. But, for all this, a personal annuity is personal property; and it will pass by a person’s will under the bequest of all his personal estate; while if it be given to one for ever, the executor and not the heir of the grantee takes it.<sup>1</sup> Questions regarding annuities generally arise thus under the construction of wills; and where an annuity is given by will without direction as to the time of its commencement, the rule is that it commences at the testator’s death.<sup>2</sup> Blackstone, while classifying annuities under the

international copyright system with Europe has (1895) been secured. See Act March 3, 1891, c. 565; and proclamations of same year.

On the subject of Patents, see latest edition of the text-book of Mr. George T. Curtis; or W. C. Robinson’s later and more extensive work (1895). See also Merwin on the Patentability of Inventions; Bump’s Law of Patents, Copyrights, &c. The

recent treatises of Curtis and Drone on copyright deserve mention; also the English work of Copinger; and Morgan’s Law of Literature.

<sup>1</sup> See Wms. Pers. Prop. 5th Eng. ed. 180–182; Co. Lit. 144 b; Earl of Stafford v. Buckley, 2 Ves. Sen. 171; Taylor v. Martindale, 12 Sim. 168.

<sup>2</sup> Craig v. Craig, 3 Barb. Ch. 76; Wiggin v. Swett, 6 Met. 194; Hilliard’s Estate, 5 W. & S. 30.

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head of incorporeal hereditaments, has distinguished them from "rent charges;" a rent charge, as he says, being a burden imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor.<sup>1</sup> At the present day, and in this country, some life insurance companies issue life annuities as a branch of their business; and such annuities are found convenient to bestow in various other instances.<sup>2</sup>

An annuity payment is to be distinguished from interest for a debt; since the latter accrues from day to day, notwithstanding a contract for payment at fixed periods; whereas an annuity is payable at regular consecutive periods, whether of greater or less extent than a year.<sup>3</sup> At the common law, therefore, there could be no apportionment of an annuity where the life dropped off in the middle of a period;<sup>4</sup> and the rule is that an annuity is not apportionable.<sup>5</sup> But as regards annuities, as well as rents, wages, and salaries, the old rule has greatly relaxed; and the right of an apportionment is at the present day sometimes given by statute, and sometimes may be inferred from the nature of the contract.<sup>6</sup> The rule itself, moreover, as construed in courts of equity, does not apply to dower or sums for the maintenance of a wife or child; while even an annuity to a widow "in lieu and full satisfaction of all dower" is within the exception, and runs to the last day of her life, although it was payable quarterly and the widow died in the middle of a quarter.<sup>7</sup>

§ 543. **The Same Subject.**—English writers and the English courts have also much to say of "bank annuities," or stock in the public funds. Mr. Williams says that soon after the revolution of 1688 a portion of the public debt was funded or transferred into "perpetual annuities;" and he

<sup>1</sup> 2 Bl. Com. 40, 41.

<sup>2</sup> Annuities have been part of our national policy in dealing with Indian tribes. 148 U. S. 691.

<sup>3</sup> 2 Bl. Com. 41, notes by Chitty and others.

<sup>4</sup> 2 Bl. Com. 43, n.; 1 Salk. 65; *supra*, § 145.

<sup>5</sup> *Helzer v. Helzer*, 71 Ind. 526.

<sup>6</sup> See 3 Kent Com. 471, n.; St. 4 Wm. IV. c. 22. Right to apportion income cannot be prejudiced by changes in the character of the investment. 11 Phila. 134.

<sup>7</sup> *Hay v. Palmer*, 2 P. Wms. 501; *Blight v. Blight*, 51 Penn. St. 420.

further speaks of the "consolidated bank annuities," in which one has a right to receive a certain percentage.<sup>1</sup> But the periodical payments on all loans of this character which may be issued by our government are regarded in the light of interest on a loan, and not as annuities at all.<sup>2</sup>

Annuities given by will are to be regarded as legacies, in the absence of some special reason for treating them otherwise; and as to their abatement, the same general rule is mainly applicable as to other legacies. But it is sometimes a matter of question whether an annuity is payable out of the capital or income of an estate.<sup>3</sup>

§ 543 a. *Pensions, Salaries, Wages, etc.* — A species of property similar to the annuity is the pension; though the term "pension" is most commonly applied to a stated and certain allowance of the annuity character, which government grants to an individual, or those who represent him, for valuable services performed for the country.<sup>4</sup> In England civil, as well as military, pensions are granted in a variety of cases, agreeably to custom or statute; to judges, political incumbents, and various public servants upon their retirement, as well as to soldiers and sailors and their dependents, from highest to the lowest grade; so that one's public service and salary become fortified by the usual consideration of half-pay or provision for one's family when active service shall end.<sup>5</sup> We have a later tendency, somewhat in the same direction, so far as judicial allowances are concerned; but civil pensions or half-pay have always been deemed foreign to American and popular institutions where public office is held rather by popular favor than as the vested right of individuals. But so far as

<sup>1</sup> Wms. Pers. Prop. 5th Eng. ed. 181, 182. See *Baker v. Farmer*, L. R. 3 Ch. 537.

<sup>2</sup> *Supra*, § 478.

<sup>3</sup> 2 Redf. Wills, 2d ed. 451, n., and cases cited; *Perry Trusts*, § 566; *Croly v. Weld*, 3 De G., M. & G. 993; *Bates v. Barry*, 125 Mass. 83. Where an annuity is bequeathed payable out of the income of the estate, and the income fails, the principal

cannot be resorted to. *Delaney v. Van Aulen*, 84 N. Y. 16.

<sup>4</sup> *Bouvier Law Dict.* "Pension."

<sup>5</sup> To superannuation allowances in various municipal and miscellaneous instances, and even in private individual relations of employment, the word "pension" is popularly applied, especially in England. See 24 Q. B. D. 371.

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army and navy service is concerned, and with reference to State volunteers besides in some great war or conflict, our policy has been constantly liberal, almost approaching sometimes to lavish expenditure; and all such legislation and policy devolves rather upon the United States, the national regulator of war and peace, than upon the several State governments; though they, too, have granted military pensions from their own considerations of public gratitude.<sup>1</sup>

Salaries and wages, whether by virtue of public or private employment, are the periodical emolument of a living and active individual under his normal contract relation with the employer. Salaries and wages are often regarded as terms synonymous; but the shade of difference seems to come in treating the wage-earner as the more humble, and the recipient of a salary the more honorable, of those who engage in serving another.<sup>2</sup> Compensation or recompense may apply to either kind of emolument, and with perhaps a still wider legal significance; but here there is no beneficial enjoyment without active work, such as annuity or pension implies.<sup>3</sup>

<sup>1</sup> The vast pension business of the United States government is transacted through the Pension Bureau in the Department of the Interior at Washington; and under the legislation of Congress, as applied particularly to the American Revolution, the War of 1812, the Mexican War, and, above all, to the great civil conflict of 1861. See U. S. Rev. Stats. § 4692 *et seq.*; also Fourteenth Amendment to Constitution, forbidding the grant of pensions to those who fought against the Union. Pensions are thus granted, by way of annuity (though not as a strict service pension), to the discharged who were disabled in the line of duty; also to the widow or children under sixteen of one killed or similarly disabled in the service, or to his dependent parents. A pledge, mortgage; or sale of a pension is expressly forbidden by statute;

and various exemptions of pension money are granted under national and local legislation.

<sup>2</sup> See Am. Cyclop. of Law, "Salary," "Wages." In *Cowdin v. Huff*, 10 Ind. 85, it is maintained that salary is a per annum or periodical compensation, while wages are compensation payable by the day, week, etc. And see 12 Ohio St. 617. But the *per diem* compensation to legislators has been construed as rather a salary, and not wages. *Commonwealth v. Butler*, 99 Penn. St. 542. "Fees" apply usually to the casual recompense of lawyers, physicians, and others of professional or official standing.

<sup>3</sup> Salaries and wages (not *per diem*) follow the rule of non-apportionment at the common law, like annuities, and subject to similar qualifications. See § 542.

§ 544. **Life Insurance; Modern Development as a Business.**

— II. A species of personal property akin to that of personal annuities is the money claim payable on a certain contingency which is commonly represented by a life-insurance policy. In this country the business of life insurance is scarcely more than fifty years old,—the oldest policy now in force dating back, as a recent writer has said, from 1843,—and it was ten years later that the business began to develop largely.<sup>1</sup> The contract of life insurance appears, however, to have originated in Continental Europe; and in the earliest distinct allusion to the subject by legal writers the practice of insuring human lives is spoken of as something inconsistent with the dignity of freemen, and more appropriate to slaves or captives. Public opinion, after a time, changed in this respect; though very slowly, for the laws of France, Holland, and other countries, expressly forbade “the making of any insurance on the life of men,” at various times during the sixteenth and seventeenth centuries.<sup>2</sup>

In England the first life insurance office was established in 1699, by the Mercers’ Company, as a “widow’s fund;” and a few years later a society “for a Perpetual Assurance Office” was chartered; sometimes, too, individuals insured one another, just as the underwriters at Lloyd’s insure shipping. But life insurance fell into disrepute, as a betting business, and it was not until about the commencement of this century that it began to be regarded with favor in the community. When, however, men came to insure their houses and goods, the advantages of insuring their lives likewise were brought home to them. Whether such contracts were under any circumstances lawful and enforceable in the courts, was a matter of some doubt at first; and in

<sup>1</sup> How rapidly it is now growing appears from the further circumstance, that the annual premiums had increased from less than five million dollars in 1860, to nearly one hundred millions in 1870. See Bliss Life Ins. preface. Many life insurance

cases have been decided in our courts since the first edition of the present work was issued.

<sup>2</sup> Bliss Life Ins. 2, 3, citing Ordinance of Wisb. art. 66; Guidon, with note of Cleirac; Boulay-Paty, Cours de Droit, tome iii. 360, &c.



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the United States, prior to 1812 at least, many good lawyers deemed them illegal.<sup>1</sup>

This subject of life insurance, then, unlike that of fire and marine insurance, is at this day so far in its primitive condition that we can trace its progress in the courts with comparative ease.

§ 545. **Contract of Life Insurance; Various Forms of Policy.** —The contract of life insurance presents, as in fire and marine risks, two parties, — the insurer and insured, the former of whom, taking his pay in premiums, issues a policy to the latter; but the rights of a third party or parties are usually involved besides, — namely, some person or persons for whose benefit the policy is issued. In this contract the insurer — usually a company — agrees to pay a given sum upon the happening of a particular event, contingent upon the duration of human life, in consideration of the immediate payment by the insured of a smaller sum, or periodical payments, by way of equivalent.<sup>2</sup>

The contract of life insurance, however, presents already some new modifications; and in these days of business ingenuity it may soon assume many more. Thus, while in its original and simplest form the insured is held bound to pay an annual premium to the insurer till his death, when the insurer is to pay the amount of insurance over to the executors or administrators of the insured (in other words, for the general benefit of the latter's estate), or to his widow, or children, or such others with an insurable interest as the insured may have designated, we yet find insurance premiums massed sometimes into annual payments for a few years only; or, again, what are called "endowment policies" are issued, these providing that the party insured shall have the insurance money absolutely, if he lives to a certain date, or if he die meanwhile, some other person indicated.

In any case, life insurance bears reference to the length of

<sup>1</sup> See *Lord v. Dall*, 12 Mass. 115; *Park Ins.* 609; 1 Atk. 338; *March v. Pigot*, 5 Burr. 2802; *Bliss Life Ins.* 2-4.

<sup>2</sup> *Dalby v. India, &c. Life Ass. Co.*, 15 C. B. 365; *Bunyon Ins.* 2d Eng. ed. 1; *Paterson v. Powell*, 9 Bing. 320; *Bliss Life Ins.* 4, 5.

existence of the person insured; and the business, which is best transacted by the undying corporation as an insurer, rests upon general statistical tables concerning the average term of human life, the insurer taking the risks of a longer, and the insured of a shorter period, in computing the profits of such transactions. In England the chances are usually taken on some contingent event, as if A. should die before B.; but in this country the event insured against is certain, and the question is only one of the time which must necessarily elapse before the insurance becomes payable.<sup>1</sup>

§ 546. *Insurable Interest in a Life.* — Notwithstanding the general rule of law, that there must be an insurable interest in the person who seeks to procure insurance on another's life, the laws of our several States are, for the most part, very liberal in construing the nature of this interest; more so, doubtless, than in England, where the gambling element of insurance proves more of a stumbling-block. Statutes to a considerable extent regulate the subject; but whether, independently of statute, a wager policy upon a life would be void, is a point upon which authorities are at variance,<sup>2</sup> though the better authority is in the negative. Indemnity for the loss of some valuable interest distinguishes life insurance from a mere wager, in principle.

Supposing an interest of some kind to be necessary, how extensive, it may be asked, is the nature of this interest to satisfy the requirements of law? Relationship to the insured may constitute a sufficient interest; and though the English rule seems to require that this relationship be accompanied with some claim to support, the tendency in this country is strongly to sustain the policy wherever there is any well-founded expectation of advantage to accrue from the insured relative's life.<sup>3</sup> A debtor may insure his life in favor of his

<sup>1</sup> Bliss Life Ins. 5-8; Briggs v. 12 Mass. 115; Rawls v. American McCullough, 36 Cal. 542; Bunyon, Life Ins. Co., 36 Barb. 357; Crotty v. Union Life Ins. Co., 144 U. S. 621. 6; Phill. Ins. § 2.

<sup>2</sup> 1 Big. Life Ins. Rep. 158, 159; See the "Gambling Act" of 14 Geo. Dalby v. India & London Life Ass. III. c. 48, which is in force in England; Bliss, 9; Bunyon, 14, 20, 209. Co., 15 C. B. 364, overruling Godsall v. Boldero, 9 East, 72; Lord v. Dall,

<sup>3</sup> Cases *supra*; Mitchell v. Union

creditor; and members of a partnership, or *quasi*-partners in a common venture, may, for protection, insure the lives of one another.<sup>1</sup> Even though the debt be less than the insurance, or not legally collectible at all, because barred by limitations, the full insurable interest of a creditor remains.<sup>2</sup> A husband may, of course, insure for the benefit of his wife or children, or both, and legislation encourages him to do so; sisters may insure the lives of brothers; a mother the life of a son; a betrothed girl the life of her intended husband; master or servant reciprocally; and pecuniary reasons are sufficient to permit of a father's insuring the life of his minor child,<sup>3</sup> or of a wife and children insuring the life of husband and father.<sup>4</sup>

In the presumptions and methods of proof, the tendency in this country is decidedly against the defence of non-insurable interest, where the policy itself appears regular; and, of course, the insurable interest is contemplated with reference to the commencement of the risk, and not a later period.<sup>5</sup> Indirect advantage, rather than a direct pecuniary claim, appears then in many parts of this country to be the true groundwork which sustains the insurable interest in a human life.<sup>6</sup>

Life Ins. Co., 45 Me. 104; Loomis v. Eagle Life, &c. Ins. Co., 6 Gray, 396; Bliss Life Ins. 10, 27, 35; Roberts v. Roberts, 64 N. C. 695; Reserve Life Ins. Co. v. Kane, 81 Penn. St. 154; Connecticut Life Ins. Co. v. Schaefer, 94 U. S. 457.

<sup>1</sup> Valton v. National Loan Fund Ass. Society, 20 N. Y. 32; Morrell v. Trenton Mut. Life Ins. Co., 10 Cush. 282; Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498.

<sup>2</sup> Rawls v. American Life Ins. Co., 27 N. Y. 282; American Life, &c. Ins. Co. v. Robertshaw, 26 Penn. St. 189.

<sup>3</sup> See May Ins. c. vi. at length. There are some late cases which tend to limit the right to insure, as among relatives mature and entirely independent of one another pecuniarily. Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35; Lewis v. Phoenix Life Ins. Co., 39 Conn. 100; Singleton v. St. Louis Life Ins. Co., 66 Mo. 63; 15

Wall. 643. And so as to creditors and others where the transaction is one of speculation rather than protection. May Ins. §§ 107, 108. But indemnity alone is favored.

When a party insures his own life, it is held that he may afterwards dispose of the policy at will, if the contract is to representatives and assigns, and it is no defence that the assignee has no interest in the life. Valton v. Loan Fund Society, 20 N. Y. 32; May, § 398. And see Campbell v. N. E. Mut. Life Ins. Co., 98 Mass. 381; 5 Sneed, 269. But see Stevens v. Warren, 101 Mass. 564.

<sup>4</sup> Central Bank v. Hume, 128 U. S. 195.

<sup>5</sup> Mowry v. Home Ins. Co., 9 R. I. 346; 1 Big. Life Ins. Cases, 375.

<sup>6</sup> See Trenton Mut. Life, &c. Ins. Co. v. Johnson, 4 Zab. 576. And see Bliss, Life Ins. 9-48, *passim*.

§ 547. **Assignment of Life Insurance Policies.** — Life insurance companies usually express their policies in such terms as to require the assent of the insurer to any assignment of the policy; and, notwithstanding important differences between fire and life policies, it is a matter of doubt whether the rule of assignability differs essentially in these classes of insurance, save so far as the validity of assignment may have been affected by statute.<sup>1</sup> Supposing, however, these preliminaries to have been complied with, or even, perhaps, without the insurer's consent or notice to him, so far as no hindrance has arisen in consequence, an assignment by way of security or outright will certainly be protected; and indeed such assignments are matters of every-day experience. There are even cases which go to sustain the partial assignment of a life policy with due notice to the insurer; though the right to break up a policy in this manner cannot be regarded as clearly settled.<sup>2</sup> On general reasoning any assignee would take the policy, subject to all the equities which attached to it in the hands of the assignor; and fraud on the part of the assignee in procuring the assignment vitiates the transaction.<sup>3</sup>

It is sometimes a matter of difficulty to determine who shall be entitled to the money payable under a policy of life insurance; and here the insurance company, wherever it is bound to pay, may find it convenient to pay the money into court, and interplead in equity the conflicting claimants to the fund. These claimants are usually wife, children, or

<sup>1</sup> See *New York Life Ins. Co. v. Flack*, 3 Md. 341; *Stevens v. Warren*, 101 Mass. 564. The question, however, might be material, whether assignment under these circumstances was to one having an insurable interest. But see *Mut. Protection Ins. Co. v. Hamilton*, 5 Sneed, 269; *Bliss Life Ins.* 514, 515; preceding section; *Valton v. Loan Fund Society*, 20 N. Y. 32; *St. John v. Am. Mut. Life Ins. Co.*, 3 Kern. 31; *Bunyon*, 253; *Stocks v. Dobson*, 4 De G. M. & G. 11.

<sup>2</sup> Cf. *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398; *Palmer v. Merrill*, 6 Cush. 282. For the English rule as to what constitutes an assignment, see *Bliss*, 511-514, and cases cited; *Bunyon*, 332-337. See, on this general subject, *May Ins.* §§ 377-399. On the whole, the assignment of a life insurance policy appears more favored than that for fire insurance. *May*, § 388.

<sup>3</sup> *Bliss*, 515, 516; *Mangles v. Dixon*, 3 H. L. Cas. 702; *Succession of Risley*, 11 Rob. La. 298.

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life policy or accepts a premium with knowledge that a breach of condition exists, forfeiture for such breach is waived.<sup>1</sup>

§ 549. **The Same Subject.** — The most material inquiries pressed upon the applicant for his statement of facts relate, of course, directly to his health, or more remotely to the probable length of his life. He is generally questioned as to his past and present health; also, as to his age, habits, occupation, and residence, since all these circumstances bear upon the risk; also, as to the health and causes of death of others in his family, this aiding in determining hereditary diseases to which the insured might be subject. And by way of caution, or to elicit further information, he is also asked for the name of his usual or last medical attendant, and whether insurance has been already applied for on the same life; and, if so, to what amount, if any, is it insured. Of these the most material inquiries relate to health present and past. The applicant may be questioned as to his general health; and as the answers so drawn out could not be very satisfactory, he may likewise be asked whether he has been subjected to specific diseases. Where life insurance is renewed, and no new conditions respecting health are imposed, and only a general condition that the party is in "good health," this expression must be construed by the terms and statements contained in the original policy; and as these words do not imply perfection, but a reasonable degree of health, they are rather vague at best, and deserve a construction favorable to the insured where his answers were honest.<sup>2</sup>

<sup>1</sup> *Phoenix Ins. Co. v. Raddin*, 120 U. S. 183. Questions imperfectly answered cannot be relied upon. *Ib.*

<sup>2</sup> *Peacock v. N. Y. Life Ins. Co.*, 20 N. Y. 293. On this point see, also, *Park Ins.* 933; *Ross v. Bradshaw*, 1 Bl. 312, and other English cases cited in *Bliss Life Ins.* 134-142; *Illinois Society v. Winthrop*, 85 Ill. 537; *Scoles v. Universal Life Ins. Co.*, 42 Cal. 523; *May*, §§ 295-298; *Cushman v. U. S. Ins. Co.*, 70 N. Y. 72. While admissions as to ill-health made by an insured not interested

in the policy have been held not receivable in evidence in certain cases to contradict the terms of the policy, there are strong instances of apparent collusion, as in the case of a husband procuring his wife's life to be insured for his own benefit, where these admissions were not only received, but upon the strength of them the policy was considered a fraud upon the insurer. *Cf. Kelsey v. Univ. Life Ins. Co.*, 35 Conn. 225; *Rawls v. American Life Ins. Co.*, 27 N. Y. 282. See *May*, § 295 *et seq.* Inquiries as to

§ 550. *Conditions subsequent vitiating the Policy.* — But besides these statements of an applicant which may be em-

whether the insured has any disease tending to shorten life are sometimes made; or to put it more favorably for him, whether he is aware of any disease tending to shorten his life. See *Fowkes v. Manchester, &c. Association*, 3 B. & S. 917; *Watson v. Mainwaring*, 4 Taunt. 763; *Bliss Life Ins.* 142-148. Concerning special diseases, questions are put as to gout, vertigo, fits, and the like. *N. Y. Life Ins. Co. v. Flack*, 3 Md. 341; *Bliss*, 149, 150; *Park Ins.* 934; *Cazenove v. British Ins. Co.*, 6 C. B. n. s. 437; 6 Jur. n. s. 826. Bronchitis, consumption, and coughs prolonged, are also among the diseases into which special inquiry is made by the insurer; also "spitting of blood," which usually indicates a disease of the lungs. See *Geach v. Ingall*, 14 M. & W. 95; *Campbell v. N. E. Mut. Life Ins. Co.*, 98 Mass. 381; *Vose v. Eagle Life & Health Ins. Co.*, 6 Cush. 42. On these and other points the insurer makes it conditional that the answers to the questions proposed shall be full, fair, and true; and upon the issue of warranty or representation the effect of wrong or imperfect replies must often be determined. In the former case, or in general, where the insurance company protects itself by stringent language, the ignorance of the insured that he is afflicted with a disease material to the risk will not save the policy, if he was so afflicted; though, as to the proof of that fact the insurer should be held within reasonable bounds, and not permitted to avail himself of any ambiguous results of a *post mortem* examination. See *Vose v. Eagle Life, &c. Ins. Co.*, 6 Cush. 42; 1 Big. Life Ins. Cases, 165, 166; *Murphy v. Mutual Benefit Life Ins. Co.*, 6 La. Ann. 518. Concerning the occupation of the insured,

upon which few can fail to give such intelligent information as is material to the risk, a false statement may often prove fatal; though here we should note that the occupation thus regarded is that in which the insured is actually engaged when the application is made, and that any statement of present occupation constitutes no warranty that it shall continue unchanged, — a condition which would certainly be oppressive under any insurance contract. *Prov. Life, &c. Co. v. Martin*, 32 Md. 310; *Prov. Life Ins. Co. v. Fennell*, 49 Ill. 180; *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466; *Bliss Life Ins.* 162-165. Age may be the subject of warranty as well as representation, and the same is true of residence and occupation; and while persons are proverbially careless in their statements on these points, deeming them of trivial importance to others, even in a contract of this nature, yet there are cases in which, through variance from the truth, the rate of premium charged is less than it ought to be, or the risk run becomes essentially greater; and here we think the policy would be vitiated. See *Bliss Life Ins.* 165, 166, citing 6 Taunt. 186, and other English cases of less importance; May, §§ 305, 306. As to personal habits of the insured: though intemperate habits, if gross and confirmed at the time of application, ought to vitiate the policy, yet the occasional use, even largely, of intoxicating liquors does not come within a provision against the excessive use of liquors or opium; nor even because a man has delirium tremens or dies of drink, does it follow that he was intemperate in his habits when he applied for insurance. See *Mowry v. Home Ins. Co.*, 9 R. I. 346; *Reichard v. Manhattan Life*

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bodied in the policy and made a part of it by suitable terms, a life policy is usually found to contain certain other stipulations hinging upon the future, or conditions subsequent, for any breach of which forfeiture of rights is threatened. Among these are to be found conditions of forfeiture for non-payment of future premiums at the periodical dates fixed; conditions limiting the travel or residence of the insured to certain specified regions, or restricting employment, so as to keep the insured out of the army or navy or from pursuits which expose human life to extraordinary perils, without express permission from the insurer, — a permission frequently granted, however, with or without asking payment, for the time being, of extra rates; sometimes, prospectively, a condition against habitual intemperance; and conditions voiding the policy for death by the insured's own hand, by the hands of justice, in a duel, or in consequence of a violation of law.<sup>1</sup>

Ins. Co., 31 Mo. 518; 1 Big. Life Ins. Cases, 313; Bliss Life Ins. 167-170. For questions concerning the medical attendant of the applicant for insurance, &c., see Bliss, 170-180; May, § 304; New York Life Ins. Co. v. Flack, 3 Md. 341; Morrison v. Muspratt, 4 Bing. 60; Anderson v. Fitzgerald, 4 H. L. Cas. 484. Upon the subject of intemperance, see May, § 299 *et seq.*, and cases cited; John Hancock Ins. Co. v. Daly, 65 Md. 6. The point of inquiry usually relates to habits and character at the time of application, not to habits as acquired or confirmed later. But a policy prospectively conditioned to become void for excessive use of liquor so as to impair health, must operate. *Ætna Life Ins. Co. v. Davey*, 123 U. S. 739. This, however, does not refer to alcoholic stimulants taken *bonâ fide* upon medical advice. 140 U. S. 76. And such provisions should receive reasonable interpretation.

Statements by the applicant fairly as to his occupation, &c., should be

liberally construed where no essential harm results. *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281. Also, as to "knowledge of pernicious habits," see, further, *Knecht v. Mutual Life Ins. Co.*, 90 Penn. St. 18; 94 Penn. St. 59; *Knickerbocker Life Ins. Co., Re*, 105 U. S. 350. Entire omission to answer a question does not vitiate. *Armenia Ins. Co. v. Paul*, 91 Penn. St. 520. But equivocation is of the nature of falsehood. *Smith v. Ætna Life Ins. Co.*, 49 N. Y. 211. As to previous injuries, see *Insurance Co. v. Wilkinson*, 13 Wall. 222.

A medical examiner who writes out answers may be regarded as agent of the company for reporting answers. *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281; May, § 303.

<sup>1</sup> The policies issued by American companies will be commonly found very stringent in these and similar restrictions; more so than English policies, which frequently distinguish in favor of a *bonâ fide* holder, while

Such conditions being violated, no matter how honorable the motives, the policy is worthless, if so the insurer chooses to regard it, and if no waiver or permit can be set up against him.<sup>1</sup>

But policies may differ in the form of clauses restricting residence and travel ; and upon the construction of a particular phrase the decision will often depend.<sup>2</sup> And where the visitation of God prevents the insured from fulfilling his part of the contract, or where some waiver by the insurance company or its agents can be inferred, courts are not reluctant to save the insurer from the harsh consequences of conduct which under some circumstances might involve the breach of a condition.<sup>3</sup> And to any permission or license, such as the insurance company is always at liberty to grant, the insurer is pretty strictly held.<sup>4</sup>

§ 551. **The Same Subject; Manner of Death.**—Death “in the known violation of law”—another condition to be found in policies—appears to be confined to criminal offences and to death *flagrante delicto* and not to extend to mere tres-

in this country the rights of a party having an insurable interest in another's life are in continual jeopardy from the latter's imprudence. See Bliss Life Ins. 300, 301 ; Bunyon, 67. “Illegal traffic,” carried on by insured, does not prejudice rights of beneficial party under a policy, where such traffic is not prohibited in terms. Lord v. Dall, 12 Mass. 115.

<sup>1</sup> Thus, an Episcopal Bishop of Rhode Island, some years ago, went beyond the limits named in the policy on his life, on a holy errand ; and though his death was neither caused nor hastened by the change of climate, but grew out of constitutional causes alone, it was adjudged that no insurance money could be recovered ; for the policy was conditioned to be void under the circumstances shown, except with consent of the insurer. Nightingale v. State Mut. Life Ins. Co., 5 R. I. 38. And see Hathaway v. Trenton M. L. Ins.

Co., 11 Cush. 448 ; Evans v. United States Life Ins. Co., 64 N. Y. 304.

<sup>2</sup> See Casler v. Conn. Mut. Life Ins. Co., 22 N. Y. 427, as to the phrase “settled limits.”

<sup>3</sup> See Forbes v. Am. Mut. Life Ins. Co., 15 Gray, 249 ; 1 Big. Life Ins. Cases, 504.

<sup>4</sup> Welts v. Conn. M. L. Ins. Co., 46 Barb. 412 ; Taylor v. Aetna Life Ins. Co., 13 Gray, 434. And see Bliss Life Ins. 302-323, and cases cited ; Notman v. Anchor Assurance Co., 4 C. B. x. s. 476 ; Bevin v. Conn. Mut. Life Ins. Co., 23 Conn. 244. For a policy vitiated because the insured went to Europe without the written assent of the company, see Douglas v. Knickerbocker Life Ins. Co., 83 N. Y. 492. And see, as to residing out of prescribed limits, Bennecke v. Connecticut Life Ins. Co., 105 U. S. 355 ; Ayer v. N. E. Mut. Life Ins. Co., 109 Mass. 430.



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passes upon property or other infringement of private rights, or to a later death provoked by an earlier crime.<sup>1</sup> But death by the hands of justice appears to be accepted always by implication on grounds of public policy.<sup>2</sup> On the other hand death by violence is covered by a policy unless expressly excepted.<sup>3</sup>

Finally, death by suicide, or by the insured's "own hand," as the phrase goes, is something against which insurance companies almost always seek to protect themselves, but often unsuccessfully. Acts of suicide are traceable in a large number of instances to insanity; and the tests of insanity are in these days, as all intelligent men well know, strangely contradictory and inconclusive. Long-continued madness preceding the commission of the fatal act may fairly be thought to render the insured so far irresponsible as to sustain the policy; but in the doubtful cases of temporary insanity or suicidal depression, the better opinion is that a policy providing against death by one's own hand, or suicide or self-destruction, will be avoided whenever the act of self-destruction is the wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of the act of suicide, and having at the time a purpose to cause his own death by that act.<sup>4</sup> But

<sup>1</sup> *Cluff v. Mut. Ben. Life Ins. Co.*, 13 Allen, 308; 99 Mass. 317; *Harper v. Phoenix Ins. Co.*, 18 Mo. 109; *Bradley v. Mut. Ben. Life Ins. Co.*, 45 N. Y. 422; *Bliss Life Ins.* 334-337; May, §§ 327-331. Death by abortion held to vitiate. *Hatch v. Mut. Life Ins. Co.*, 120 Mass. 550. As to "death by hands of justice," see May, § 326; 4 Bligh, n. s. 194. As to death in military service, see May, §§ 332-334; 24 Gratt. 540; 44 Ga. 119.

Sundry provisions respecting time and manner of death are to be construed according to the terms of the policy. See *Jennes v. Northwestern Life Ins. Co.*, 26 Minn. 271. Death from intemperance is sometimes pre-

scribed in policies as a cause of forfeiture. See May Ins. § 302.

<sup>2</sup> May, § 326; 5 M. & G. 639; 1 Jones (N. C.) Law 126.

<sup>3</sup> May, § 330.

<sup>4</sup> See *Borradaile v. Hunter*, 5 M. & Gr. 639; *Dean v. American Mutual Life Ins. Co.*, 4 Allen, 96; *St. Louis Mut. Life Ins. Co. v. Gravea*, 6 Bush, 268; *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466; *Eastbrook v. Union Mut. Life Ins. Co.*, 54 Me. 224; *Breasted v. Farmers' Loan & Trust Co.*, 4 Hill, 73; *Cooper v. Mass. Mut. Life Ins. Co.*, 102 Mass. 227. And see *Bunyon*, 73; *Bliss Life Ins.* 346-400; May, §§ 307-325. The authorities are quite discordant in announcing general prin-

if death is caused by one who, while intending to kill himself, was so disordered in his reasoning faculties that he cannot understand the general nature and consequences of the act or is impelled thereto by an irresistible insane impulse, which he cannot resist, the insurer is liable.<sup>1</sup>

§ 552. **When the Insurance Risk commences.**—When does the risk under a life insurance policy commence? As in other kinds of insurance it may commence from any time mutually agreed upon; whenever, according to the facts presented, there was a meeting of the minds of the parties on all essentials of the contract. But usually the life insurer issues a written policy, based upon a preliminary application, with questions and answers filed; and it is agreed that the policy shall not be delivered, nor the contract take

ciples as concerns suicide; but there will be found less variance when the facts in the different cases are closely compared. The rule announced in the text (that of *Dean v. American Mutual Life Ins. Co.*) is not favored in New York, where it is considered that one must have been able to appreciate moral consequences in order to defeat the policy, — that the suicide must have been felonious. *Newton v. Mutual Benefit Life Ins. Co.* 76 N. Y. 426. See also next note. The precise words of the policy as to suicide vary in different policies. See *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284. "Dying by one's own hand or act, whether sane or insane," is often preferred now by companies to "suicide." See May, § 311. Intention of self-destruction, with consciousness of physical consequences, held sufficient — under such expression — to avoid, although one was not conscious of the moral nature of the act. *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27. See further, May, § 322. Innocently taking a fatal overdose of medicine is not dying by one's own hand or act. *Penfold v. Universal Life Ins. Co.*, 86 N. Y. 317. To pry

farther into the inaccessible regions of a flickering intellect seems all the more inappropriate, when we reflect that insurance contracts are made between parties who are supposed to have in mind the common-sense interpretation of familiar expressions, and not those nice distinctions which some medical experts would fain force upon us.

<sup>1</sup> *Mut. Life Ins. Co. v. Terry*, 15 Wall. 58. Here the rule with its alternative appears on appeal consistently announced; and still more so by Mr. Justice Miller on the circuit. 1 Dill. C. C. 403. There is still, however, much uncertainty; the rule of some cases insisting apparently upon the distinct element of "moral" comprehension, and so affording all possible favor to those who claim under the policy in cases of suicide. And to that latter rule the Supreme Court of the United States has fully at last (1896) committed itself. *Connecticut Life Ins. Co. v. Akens*, 150 U. S. 468, 473, and cases cited.

There should be no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity. 1 Dill. C. C. 403.

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effect until the first premium is paid by the insurer.<sup>1</sup> The date when the risk commences and the date of its termination are both indicated clearly in all well-drawn policies.<sup>2</sup>

§ 553. *Forfeiture through Non-Payment of Premiums.*—We have seen that life insurance policies are made forfeitable, during the continuance of that life upon which the risk was taken, for breach of various conditions. Among these conditions is that of non-payment of premiums. Fire and marine policies run for short periods, and are frequently renewed; but life policies commonly run for an uncertain, and that perchance a very long, period. While, then, the payment of a single premium in advance may insure a house against fire or a ship against the perils of the sea, premiums under a single life insurance policy are usually receivable by the insurer in periodical and generally annual sums. Any failure on the part of the insured to pay the premium promptly when the day comes round forfeits the policy, if the contract be thus conditioned; and it is only as a favor, under such circumstances, not as a right, that a continuance of the risk can be claimed on the part of the delinquent.<sup>3</sup>

But the waiver of a forfeiture for such cause may be evinced by acts, as well as by the express agreement of the company; and no form of waiver is more common than that

<sup>1</sup> There may be, of course, a waiver of prepayment on the part of the insurer; or a binding oral contract of insurance to be inferred from acts or words; or a contract which fails to express the mutual intention of the parties, and reformable in equity; or a new insurance contract which has superseded the existing one; but in all such cases the party claiming the benefit of something so unusual should establish his right by clear and convincing proof. See *Bliss Life Ins.* 181-248, and cases cited in general works on fire and marine insurance; *Com. Mut. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318; *Xenos v. Wickham*, L. R. 2 H. L. 296; *St. Louis Mut. Life Ins.*

*Co. v. Kennedy*, 6 Bush, 450; *Faunce v. State Mut. Life Ass. Co.*, 101 Mass. 279; *Myers v. Keystone Mut. Life Ins. Co.*, 27 Penn. St. 268.

<sup>2</sup> See *Ruse v. Mut. Ben. Life Ins. Co.*, 23 N. Y. 516; *Am. Horse Ins. Co. v. Patterson*, 28 Ind. 17; *Bliss*, 248-250. And see May, § 340.

<sup>3</sup> *May Ins.* § 341. In *Windus v. Lord Tredegar*, 15 L. T. n. s. 108, the House of Lords denied the right to relief in equity on a lapsed policy, even though the lapse was without culpable negligence on the part of the insured. To the same effect see *Klein v. Life Ins. Co.*, 104 U. S. 88; 52 Md. 16. Insanity of the insured affords no excuse. *Wheeler v. Conn. Life Ins. Co.*, 82 N. Y. 543.

of a receipt by the company or its authorized agent of a premium after the day when it became payable. Waivers of this sort are regarded with favor to the insured, and the company receiving a new premium is held bound to knowledge of the actual time of payment.<sup>1</sup> Where, as often happens in this country, the annual premium is paid in part by a note, and the policy by its terms is forfeited on the non-payment of the note at maturity, like considerations apply; and if the insured dies after the note becomes due and the note is not paid, the insurer is released from liability.<sup>2</sup>

But non-forfeitable policies are sometimes issued; and even non-forfeiture laws are enacted in some States, with the special object of protecting the insured against the most disastrous consequences attending a delay in the payment of his regular premiums.<sup>3</sup> And any agreement, declaration, or course of action, on the company's part, which leads the party insured honestly to believe that by conforming thereto he

<sup>1</sup> *Ib.*; *Hodsdon v. Life Ins. Co.*, 97 Mass. 144; *May*, § 361; *Wing v. Harvey*, 5 De G. M. & G. 265; *Bouton v. Am. M. L. Ins. Co.*, 25 Conn. 542; *Bliss*, 253 *et seq.*; *Catoir v. Am. Life Ins. & Trust Co.*, 33 N. J. 487. Days of grace are sometimes allowable to the insured by custom; and even the want of a notification habitually given by the company may in some instances relieve the insured from forfeiture. See *Helme v. Phil. Life Ins. Co.*, 61 Penn. St. 107; *Bliss*, 286; 1 *Big. Life Ins. Cases*, 99, 621. But want of a notice is not a good excuse as a rule. 97 Penn. St. 15; 104 U. S. 252. Premiums may be payable in labor or services. 18 Minn. 448; *Kentucky M. L. Ins. Co. v. Jenks*, 5 Ind. 96. See further, *May*, § 345. The last day for payment occurring on Sunday, the premium is not payable until Monday. 121 Mass. 499; *Hammond v. Am. Mut. Life Ins. Co.*, 10 Gray. 306. And see *Campbell v. Int. Life Ass. Co.*, 6 Cush. 42; *Howard v. Continental Life Ins. Co.*, 48

Cal. 229. Parol waiver of a condition has been sustained. *May*, § 346.

<sup>2</sup> *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500; *Bliss*, 261-269; *McAllister v. N. E. Mut. Life Ins. Co.*, 101 Mass. 558; *N. E. Mut. Life Ins. Co. v. Hasbrook*, 32 Ind. 447; 123 Mass. 113. Where forfeiture for non-payment of a note, &c., is doubtfully expressed or not expressed at all, non-forfeiture is the fairer construction. *May*, §§ 341-343; 101 Mass. 558; 32 Ind. 447. Cf. 60 Ind. 515, and 41 Mich. 385. And see *American Ins. Co. v. Klink*, 65 Mo. 78. If the contract required the company to give previous notice (as in an assessment) such notice is a prerequisite to forfeiture. 139 U. S. 297.

<sup>3</sup> *Bliss*, 293, 405; *Carter v. John Hancock Life Ins. Co.*, 127 Mass. 153; *Chase v. Phoenix Ins. Co.*, 67 Me. 85; *May*, § 344; 73 N. Y. 480. A premium payable is not strictly a debt. 41 Conn. 416. A non-forfeitable statute, if mandatory, controls

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will avoid a forfeiture, may be set up as against the strict letter of the policy itself.<sup>1</sup>

§ 554. *Re-Insurance, Double Insurance, etc.* — The doctrine of re-insurance applies with much the same force to life as to fire and marine risks; the original insurer thus protecting himself by getting some other insurer to cover his liability; and cases have arisen in England, under statutes of that country permitting the amalgamation of insurance companies, where the risks of the old company, with the assent of policy-holders, are transferred to the new one.<sup>2</sup> And “double insurance,” if this term be a proper one in the present connection, is also very common; that is to say, on one life or risk and for one and the same insurable interest, insurance may be effected in various companies. Generally speaking, no price is set upon a man’s life; and, unless prohibited by the terms of his policy, the insured may go and insure himself again elsewhere without regard to amount.<sup>3</sup> It is not an uncommon thing at this day for married men of good and secure incomes, but small available capital, to insure their lives heavily, and by the payment of annual pre-

the contract of insurance. 140 U. S. 226.

Whether act of God (*e.g.* death) or of a public enemy (*e.g.* war) or the obligor’s own acts, can be set up to excuse the non-payment of premium at the stipulated date, see May, §§ 350-355, showing that the latest cases are somewhat discordant. *New York Life Ins. Co. v. Statham*, 93 U. S. 24, and cases cited; *Homer v. Guardian Ins. Co.*, 67 N. Y. 278; 11 *Am. Law Rev.* 221; 18 *W. Va.* 400. See as to death, *Palmer v. Phoenix Life Ins. Co.*, 84 N. Y. 63. See, as to acts not amounting to waiver of forfeiture, 88 N. Y. 541; 80 N. Y. 32. Policies are not always clear in their expressions as to the date when premiums are payable, or the certainty of a forfeiture for non-payment. See *Phoenix Life Ass. Co. v. Sheridan*, 8 H. L. Cas. 745; *Bliss*,

254; *Norton v. Phoenix Life Ins. Co.*, 36 Conn. 503.

<sup>1</sup> *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439. Payment to the company’s agent is good though he convert the premium money to his own use; but the agent’s scope of authority follows the usual rules. See May, § 345. Part-payment of a premium is not compliance with the contract; nor does it give a right *pro tanto* to the fund. 74 N. C. 22; 81 Ind. 300; May, *ib.*

<sup>2</sup> See *Bliss Ins.* 250, 682; *Phil. Life Ins. Co. v. Am. Life & Health Ins. Co.*, 23 Penn. St. 65; *Bunyon*, 158; *Ernest v. Nicholls*, 6 H. L. Cas. 401; *In re India & London Life Ass. Co.*, L. R. 7 Ch. 651.

<sup>3</sup> *Mowry v. Home Insurance Co.*, 9 R. I. 346; May, §§ 364-376, and cases cited. But policies are often guarded on such a point and the contract governs.

miums provide handsomely for their families in the event of death, while living freely in the mean time. And inquiries made by companies as to whether an applicant has already been insured are chiefly for ascertaining what other insurers thought of the same risk, and thus aiding their own determination; though the danger of having a risk so heavily valued as to tempt death is always for obvious consideration.

§ 555. **Time and Mode of obtaining Payment.** — A life insurance policy, by its own terms, was almost invariably in former years made payable on the death of the insured person before the risk expired; though risks are sometimes taken only for a specified number of years, and endowment policies to be paid absolutely after a given number of years are becoming quite common of late. The rule as to death is that it must actually occur during the continuance of the policy; nor can it avail that the cause of death arose during the existence of the policy, the life having ceased after the policy expired. For instance, the fact that a mortal wound was received while the policy continued does not, unless the policy is worded to that effect, cast any new liability upon the insurer, the extent of whose risk must ordinarily be referred to the period of actual death.<sup>1</sup> Policies are so carefully worded, even to the precise moment of the day when the risk expires, or the precise extent of the risk, that in the great majority of cases there can be little perplexity. But where the insured person has disappeared, or a casualty occurs under such circumstances that the exact time of death, or indeed the fact of death, cannot be ascertained, the insurer's liability is to be determined by the ordinary rules of evidence and the doctrine of presumptions.<sup>2</sup>

The executor or administrator of the estate of the insured, or such other party as may be entitled to the benefits of the policy, must scrutinize its terms very carefully as soon as

<sup>1</sup> 1 T. R. 260; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276; *Perry v. Prov. Life Ins., &c. Co.*, 99 Mass. 162.

<sup>2</sup> See *Bliss Life Ins.* 289-299; 1 Greenl. Ev. §§ 30, 278; *Moehring v. Mitchell*, 1 Barb. Ch. 264; 3 Denio, 610.

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possible after the death has occurred ; for insurers have very cunning contrivances ready — of which, to their credit, it should be said, they do not avail themselves as frequently as they might — for evading payment of the insurance money at the very last moment. Life policies usually provide that the insurance money shall become due and payable at a certain time, — say sixty days after formal notice and presentation of formal proofs of death, and not before. Proofs, too, must frequently be prepared in a specified manner, and be presented within a limited time after the death of the party insured, pending the expiration of which the company cannot be sued.<sup>1</sup> Another point in which insurers are quite astute is in providing a special limitation of time within which suit may be brought upon the policy ; shortening by contract the period of limitations ordinarily prescribed by law, and otherwise modifying the remedies of parties entitled to the insurance money, to meet their own convenience.<sup>2</sup>

<sup>1</sup> There is, certainly, reason in such requirements, inasmuch as the company should have proofs, and be allowed time to investigate the facts of death and questions of liability in its own way ; but there is hardship besides in conditioning the rights of a party entitled to the benefit of insurance upon a rigid compliance with mere formalities of notice, preliminary proofs, and sworn certificates ; hence the courts will readily presume that the company has waived defects in the proofs or dispensed with them altogether. And such a requirement might be so unreasonable of itself that public policy would reject it. *Loomis v. Eagle Life & Health Ins. Co.*, 6 Gray, 396 ; *Provident Life Ins. Co. v. Baum*, 29 Ind. 236 ; *Bliss Life Ins.* 407-418 ; *O'Reilly v. Guardian Ins. Co.*, 60 N. Y. 169 ; *Taylor v. Aetna Life Ins. Co.*, 13 Gray, 434 ; *Woodfin v. Asheville Mut. Ins. Co.*, 6 Jones, 558 ; 1 *Big. Life Ins. Cases*, 375 ; *Miller v. Eagle Life & Health*

*Ins. Co.*, 2 E. D. Smith, 268 ; May, ca. 19, 20.

<sup>2</sup> Conditions of this sort contained in a policy should, like those which relate to notice and proof of death, be carefully examined and diligently complied with ; for insurers have the right to designate the terms upon which they will be responsible for losses, and the contract of insurance is a voluntary one. Yet conditions like these are and ought to be construed liberally for the insured, even where the mouth of the insurer is not stopped by his own acts and conduct against asserting that there has been a breach and forfeiture of the policy. See *Bliss Life Ins.* 561-570, and cases cited ; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386 ; *Ames v. N. Y. Union Ins. Co.*, 4 Kern. 253 ; May, c. 21. Most cases on this point relate to fire insurance. As to agreement not to sue except in States where the insurance company is located, see *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518.

§ 556. **Insurance against Accidents.** — III. Insurance against accidents is a branch of business not yet greatly developed, though pursued to some extent in Great Britain and the United States. The want of proper statistics to serve as a basis for risks of this character is a serious obstacle to taking them; for the more shifting the rule of chances, the more surely does an insurance transaction sink to the level of common gambling. But experience may bring a more correct understanding of the business, and establish hereafter a better state of mutual confidence between insurer and the insured. The avowed object of such contracts is humane, and in these days of perilous travel the benefits received may often be highly valuable. The contract which is most frequently made in our country with railroad passengers appears in form as one by which the insurer agrees to pay a given sum per week during disability caused by any accident received while the risk continues, and a gross sum in case of death by accident; this contract being, however, subject to various modifications, according to circumstances. In this country the business is generally conducted in a brief and informal manner; the traveller purchasing an accident insurance ticket of some agent near the railroad ticket office, and the bargain being consummated in a hurried manner and upon a verbal application with neither warranty nor representation on the part of the insured. But sometimes the business is conducted with those formalities which attend the transaction of life insurance business, in which case the usual doctrines of life insurance would apply; and in general the law of accident insurance differs not greatly from that of life insurance, except in its greater apparent simplicity.<sup>1</sup>

An accident insurance company will often issue tickets at the principal office, and transmit them to various agents to sell them indifferently, in which case even an agent's clerk may sell them. And we often find two classes of tickets

<sup>1</sup> See Bliss Life Ins. 683 *et seq.*; May Ins. c. 23. As the contract is not strictly one of indemnity, the parties may agree upon the amount recoverable within such reasonable limits as may prevent it from being a wager policy. May Ins. § 535.



sold: one known as the "traveller's risk," and the other, which is higher priced, known as the "general accident." Tickets of the latter description have been held binding, even when purchased by railroad employees.<sup>1</sup>

The reported decisions concerning accident insurance relate chiefly to the construction of phrases used in the insurance policy or ticket; and these phrases suggest as the leading inquiry whether the insured party was injured "by accident" at all. As to this inquiry, it may be observed that the term "accident" excludes the idea of design, and denotes an event which proceeds from some unknown and unforeseen cause, or happens without one's will or intention.<sup>2</sup> But our latest decisions, turning upon the dubious reservations of such contracts, leave it exceedingly doubtful whether a policy of this sort is worth taking out unless ex-

<sup>1</sup> *Brown v. Railway Passenger Ass. Co.*, 45 Mo. 221.

<sup>2</sup> In *North American Ins. Co. v. Burroughs*, 69 Penn. St. 43, death by accident was defined to be "death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things." And see 131 U. S. 100.

It is reasonable to construe the word "accident" in such policies with reference to the will, intention, or design of the party insured, and not that of others having an agency in the disaster. Thus, a railway servant might intend to throw a train off the track and cause injuries, in which case, as to himself, there would be no accident resulting; yet, as to a passenger not expecting or having any agency in producing that result, the injuries sustained would be accidental injuries, and ought to entitle him to recover. This principle has been applied in a case where the insured was attacked by highwaymen while journeying. See *Ripley v. Railway Pass. Ass. Co.*, 1 Dillon, 403. And see *Sinclair v. Maritime, &c. Ins.*

*Co.*, 3 El. & El. 478; *Providence Life Ins., &c. Co. v. Martin*, 32 Md. 310; *Southard v. Railway Pass. Ass. Co.*, 34 Conn. 574. See *Prov. Life, &c. Co. v. Baum*, 29 Ind. 236, as to proofs of death. "Violent means," as well as accidental, are sometimes insured against.

Where the insured party causes the injury plainly by his own voluntary wilful or simply careless act, though not foreseeing that injury would result from such act, the inclination is to hold the insurer discharged from liability; and the ticket often expressly disclaims liability on the company's part for injuries caused by the insured person's wilful and wanton or negligent exposure. *Moral v. Miss. Life Ins. Co.*, 4 Bush, 535; 56 Iowa, 664; *Southard v. Railway Pass. Ass. Co.*, 34 Conn. 574. But see *Schneider v. Prov. Life Ins. Co.*, 24 Wis. 28, which treats such an element for consideration with disfavor; *May*, §§ 530, 531, and latest citations. See, as to other reservations in such policies, *Shader v. Passengers' Ins. Co.*, 66 N. Y. 441; 37 L. T. n. s. 356.

pressed plainly and simply, and with a liberal scope of expression in the contract.<sup>1</sup> Where the conveyances are specially designated and limited in the policy, the risk is not to be extended to accidents caused in other conveyances or while the insured is travelling on foot; but a liberal construction applies to language so used, and in a proper case changes of conveyance incidental to the general journey insured against will be deemed embraced within the scope of the insurance contract.<sup>2</sup>

§ 557. **Insurance on Property; Fire and Marine Insurance.** — IV. Hitherto we have considered only insurance risks assumed with reference to a person and which contemplate the payment of money on some lapse of life or health and bodily soundness. But insurance has reference often to risks taken upon property; or where the mutual intent is to replace that which may become destroyed or lost through some peril to which it is specially exposed. *Fire* and *Marine* insurance are the most familiar kinds referable to this latter head.

This kind of contract, by which one party undertakes to indemnify another against the loss of certain property, owes its present flexibility to the energy and shrewdness of modern

<sup>1</sup> "Intentional injuries," caused by any person, are sometimes expressly excepted from such policies. 127 U. S. 661. This confines the risk very considerably. But jumping on or off a platform might be sometimes accidental in the popular sense of the term "accident." 131 U. S. 100. Or an injury in a fray. 104 Ind. 133.

<sup>2</sup> Northup v. Railway Pass. Ass. Co., 2 Lans. 166; s. c. reversed, 43 N. Y. 516. Cf. Theobald v. Railway Ass. Co., 10 Ex. 44. On this subject, generally, see at length Bliss Life Ins. 683-721, which cites several English and unreported American cases. As to accidental death from various causes, see May Ins. §§ 515, 516; Mallory v. Travellers' Ins. Co., 47 N. Y. 52; Reynolds v. Accidental Ins. Co., 22 L. T. n. s. 820. Loss

cannot be recovered for partial disability when the express stipulation of the contract is for total disability. Lyon v. Railway Pass. Ass. Co., 46 Iowa, 631. As to whether one is a traveller, see May Ins. § 525. Travelling on foot is not travelling by a "public or private conveyance." Ripley v. Railway Pass. Ass. Co., 16 Wall. 336. But see May, § 529, criticising this decision. Reservations as to "change of occupation" are to be liberally construed. Stone v. Casualty Co., 5 Vroom, 371; 69 Penn. St. 43; May, § 532. Insurance against injury by accident includes all accidents not excepted by the express terms of the policy. Prov. Life Ins. Co. v. Fennell, 49 Ill. 180; Prov. Life Ins. Co. v. Martin, 32 Md. 310. See also Perry v. Prov. Life Ins. Co., 103 Mass. 242.

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capitalists. The bottomry bond, which we have already examined, secures a loan upon the principle of insurance; and ships have been insured ever since the period when Rhodes controlled the navigation of the Mediterranean. But the law of fire insurance dates back in the courts only little more than a century and a half; and yet this branch of business at present engages the attention of large chartered companies in England and the United States, which, in taking their multitudinous risks, keep an immense aggregate capital constantly employed. Whatever the nature of the property on which such an insurance risk is taken, whether on houses or furniture, the risk itself, being an incorporeal chattel, represents personal and not real property, so far as the rights under the policy have any pecuniary value.

§ 558. **The Same Subject.**—Insurance on fire, as the name imports, applies to buildings and all species of property, real and personal, which are subject to destruction or direct damage by fire; and the insurance itself may be defined as a contract to indemnify for loss or damage to specified property, occasioned by that element, for a specified period. The contract itself, as in other cases of insurance, is called a *policy*, and the consideration of the contract is called the *premium*.<sup>1</sup> Fire insurance appears to have first become the subject of judicial cognizance in England at the beginning of the eighteenth century.<sup>2</sup>

Insurance as applied to perils by sea, or *marine* insurance, is much older, though to Americans of the present day perhaps less familiar, than fire insurance. Not to speak of bottomry and hypothecation, contracts were made for the express purpose of insuring ships and merchandise from losses at sea at a very early period of modern history; and in a collection of Venetian state papers lately published in England, which relate to the trade of these countries, is found the statement of a merchant of Venice, made in 1512, as to the

<sup>1</sup> Fland. Fire Ins. (1871) 17; mit of the extended examination of Bouv. Dict. "Insurance;" 3 Kent fire insurance. Com. 466. See also May Ins. *passim*.  
<sup>2</sup> See Lynch v. Dalzell, 4 Brown P. C. 431; decided in 1729 on appeal.

rate of marine insurance effected in England on property from Candia.<sup>1</sup>

Much that is laid down by the courts concerning fire insurance applies, with corresponding changes, to marine insurance. Here we have a contract between the insurer, or underwriter, and the insured, which generally takes its expression in that written instrument known as a policy, though such contracts might on general principle be oral only; and marine insurance policies, too, are signed by the insurer and not the insured, according to the uniform practice; the payment of a premium by the latter making the bargain complete.<sup>2</sup> In this and in most respects, the doctrines of fire and marine insurance will be found quite or nearly alike; indeed, fire insurance, being the more recent topic of law, may be said to have sprung from marine insurance, as from a parent stock, notwithstanding its own capability, in latter days, of infusing some new elements of growth into that which first gave it existence. In point of fact the law of insurance, whether as to persons or property, may be studied as a whole with reference to leading principles.<sup>3</sup> The contract of insurance is to be construed; there are doctrines as to warranties which may vitiate the policy if the insured is heedless as to his stipulations; doctrines as to representations which, if not material, will be lightly regarded; doctrines concerning the payment of premiums to

<sup>1</sup> See Manly Hopkins on Marine Ins., cited in 1 Pars. Marine Ins. 10. The statute of 43 Eliz. c. 12 (1601), speaks in the preamble of this "usage among merchants, both of this realm and of foreign nations," as something that "hath been time out of mind;" the practice of these merchants being, "when they make any great adventure (especially into remote parts), to give some consideration of money to other persons, which commonly are in no small number, to have from them assurance made of their goods, merchandise, ships, and things adventured, or some part thereof, at such rates and in such sort

as the parties assurers and the parties assured can agree, which course of dealing is commonly called a policy of assurance, by means of which it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon those that adventure not than upon those that adventure." 43 Eliz. c. 12; cited in 1 Pars. Marine Ins. 10.

<sup>2</sup> 1 Pars. Mar. Ins. 34, 43; Hamilton v. Lycoming Mut. Ins. Co., 6 Penn. St. 339.

<sup>3</sup> Mr. May's treatise is prepared on such a principle.

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the insurer; doctrines, too, as to the enforcement of rights, on the happening of the contingency insured against, in accordance with the provisions of the policy.

§ 559. **Miscellaneous Kinds of Insurance; Guarantee, etc.; Final Observations.**—We may add, in passing, that there is still another kind of insurance business, which, though taken up by several companies in this country, and established already on a very fair footing in England, is but little understood or esteemed here. The risk thus assumed is that of losses which employers suffer through the misconduct of their clerks; corporations, by the unfaithfulness of the corporate officers, and so on; in other words, the insurer guarantees the honesty of parties, and the contract is one of guarantee insurance.<sup>1</sup>

There seems, in fine, no reason why we may not find the principle of insuring against hazards successfully applied, during the present century, in a variety of other ways not yet opened to enterprise and competition.<sup>2</sup>

But, on the whole, it should be said that the right to receive money under a contract on some contingency which may never happen partakes little of the essential and legal character of property, as the valuable subject of ownership; though it is otherwise, of course, when, by the happening of such contingency, payment becomes actually due from the insurer, by way of a money fund. There is but one kind of insurance among those we have enumerated—that upon a life—where it can be said that the risk involves absolute

<sup>1</sup> See Bliss, 722-733, citing English cases; Bunyon, 107 *et seq.* We are not aware of any decisions under this head in American reports. Mr. Bunyon says that this kind of insurance is beset with difficulty; for the guarantee of honesty continually resolves itself into the more difficult question of the guarantee of commercial credit or at least of solvency. See also May, §§ 540-547. The average honor or solvency of any community is hardly to be shown by statistics.

<sup>2</sup> Insurance of rents, of titles, against theft, hailstones, upon the lives of cattle and against accidents to carriages, are various species of the insurance contract known in England and Continental Europe, but thus far introduced but slightly (except for title insurance) into this country. See May Ins. §§ 544-547. Even insurance against the birth of issue has been practised to some extent in Great Britain. *Ib.* So, too, a landlord's liability is insured against.

payment at a more or less remote period ; and even here the risk assumed is sometimes limited to the contingency of death within a specified period, or so that death under prescribed conditions shall vitiate the policy ; while, furthermore, the rights of particular beneficiaries designated by such a contract may depend upon the contingency of surviving the life insured.<sup>1</sup>

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## CHAPTER XII.

### LEGACIES AND DISTRIBUTIVE SHARES.

§ 560. *Legacies and Distributive Shares in General.* — The various classes of personal property to which we have hitherto devoted our attention are such that ownership in the thing may be acquired in a variety of ways, chiefly by means of a contract between living parties. But legacies and distributive shares pass by the death of one person to another, death indeed giving them full creation ; and in such property original title is acquired by “succession,” to use the broad word of the civilians ; in other words, it is transmitted by one’s last will and testament, in which case there is a legacy, or else by the law, when we find a distributive share instead, under the local statute of distributions. Of course by devise under a will or by descent, and as a “succession” title, one acquires real property interests ; but their treatment is not within our present scope.

From the main aspect, legacies and distributive shares seem to fall in place under the head of Title to Personal

<sup>1</sup> The topics of Fire and Marine Insurance are treated at length in the treatises of Phillips, Angell, Arnould, and others. Mr. Bliss deals with Life Insurance. But for American readers the best works of reference are those of Flanders and John W. May on Fire Insurance (the latter edited in an 1891 edition by Mr. Frank Parsons) and Parsons on Ma-

rine Insurance. Mr. May’s treatise has the advantage of comprehending all kinds of insurance except marine risks. Judge Bennett’s Fire Insurance Cases, and Prof. Bigelow’s Life, Accident, &c. Insurance Cases, are valuable as supplying complete series of the decisions themselves in compact volumes, so far as they continue.

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Property; since money, furniture, stock, bills and notes, and the other classes of personal property which we have considered, retain their identical character, though massed together or passing separately by way of gift upon the owner's death, and so finding a new owner. And yet we shall not do violence to our subject by devoting a chapter to their brief consideration as a species of personal property. For a legacy or distributive share, expectant or vested, is assignable under suitable circumstances like other *choses in action* or incorporeal chattels,<sup>1</sup> and constitutes, as it might be said, a sort of debt from a dead man's estate, or an incorporeal right to recover various specific goods or a sum of money therefrom. Viewed in this light, legacies and distributive shares appear as distinct classes of incorporeal personal property possessing an intrinsic value of their own not lightly esteemed in the community. Let us, then, close our examination of the leading classes of personal property, by sketching a brief outline of the law pertaining to these last of incorporeal chattels.

§ 561. **Legacy defined.** — I. A legacy is a gift by last will; and this word appears to be generally synonymous with "bequest," though more familiarly spoken; since both of these terms commonly signify that the gift made is one of personal and not real property; the latter, however, being the more precise in such a sense. Persons often use words carelessly in their testamentary dispositions, else they would apply to a gift of real estate the more appropriate word "devise."<sup>2</sup> Our present concern is of course only with legacies in the strict sense, that is, to testamentary gifts of personal property; although the term is sometimes used with reference to a charge upon real estate.<sup>3</sup>

§ 562. **General and Specific Legacies; Demonstrative Legacies.** — Legacies are of two sorts, general or specific. A legacy is said to be general when it does not amount to a bequest of

<sup>1</sup> See, *e.g.*, *Bryan v. Spruill*, 4 Jones Eq. 27; *Weems v. Weems*, 19 Md. 334.

<sup>2</sup> See *Bouv. Dict.* "Legacy," "Bequest," "Devise."

<sup>3</sup> 2 *Wms. Ex'rs*, 6th Eng. ed. 981-

984; 2 *Redf. Wills*, 2d ed. 1-4; 2 *Str.* 1253; 4 *Kent Com.* 509, 510; *Hawes v. Humphrey*, 9 *Pick.* 350; *Cornell v. Woolley*, 40 *N. Y.* 378. As to legacies, see also *Schoul. Ex'rs and Adm'rs*, §§ 458-475.

any particular portion of, or article belonging to, the estate, as distinguished from all others of the same kind; but when it does amount to such a bequest, the legacy is said to be specific. The same distinction is made at the civil law, which furnishes the striking illustration that, if one bequeathes "my watch" or "my diamond ring," the legacy is specific; while if he bequeathes "a watch" or a "diamond ring," the legacy is general. In the one instance that particular watch or ring must be delivered; in the latter any watch or ring of the kind will answer. The consequences of the distinction are important: for, on the one hand, the party to whom a specific legacy is given can have no claim upon the estate on that account, if the thing given cannot be found and identified among the testator's assets; while, on the other hand, if it can be found and identified, he is entitled to it without being required to contribute towards making up any unexpected deficiency which may arise in regard to the other portion of the estate. Thus, the bequest of "my diamond ring" is ineffectual, unless the testator leaves a diamond ring of his own answering to the description; but if he does, the legatee should have it in its present condition, neither better nor worse, and without diminution from the circumstance that the estate is not large enough to pay all legacies in full. Hence there are both advantages and disadvantages to be found in a specific legacy as compared with a general one.<sup>1</sup> General legacies are usually of money.

There is a class of legacies lying between the general and specific, to which the civilians applied the term demonstrative legacies; and in this class we include bequests of a certain amount of money to be paid out of a particular fund.<sup>2</sup>

§ 563. *Residuary Bequest or Legacy.* — That which remains of a testator's estate after paying all debts and expenses and satisfying all particular bequests and devises is the residue,

<sup>1</sup> 2 Wms. Ex'rs, 1076 *et seq.*; Fontaine v. Tyler, 9 Price, 94, 104; 2 Dom. Civ. Law, § 3546; 1 Roper, 3d ed. 170; Schoul. Ex'rs, § 461; Purse v. Snaplin, 1 Atk. 414; Norris v. Thomson, 2 McCarter, 493; Foote,

Appellant, 22 Pick. 299; Stephenson v. Dowson, 3 Beav. 342.

<sup>2</sup> Creed v. Creed, 11 Cl. & Fin. 508; Touch. 433; Coleman v. Coleman, 2 Ves. Jr. 640; 2 Wms. Ex'rs, 6th Eng. ed. 1078; 1 Roper Leg. 215, 3d ed.



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and the person to whom this residue is devised or bequeathed is known as the residuary legatee. A residuary bequest, so far as personal property is concerned, carries everything not otherwise effectually disposed of, whether such other disposition was at all attempted by the testator or not. The presumption here being that at most a testator intended to take from the residuary legatee only for the sake of the particular legatee, the former is a greatly favored party, and the courts would much sooner construe a will so as to carry over to him the residue of the personal property, than treat the case as one of a partial intestacy.<sup>1</sup>

§ 564. **Distributive Shares considered.** — II. Lastly as to distributive shares. When a person dies intestate, leaving personal property more than sufficient to pay all his just debts and the expenses involved in settling his estate, the balance goes by way of distribution to such persons and in such shares as the law may have directed. The shares thus left over are known as distributive shares; the officer, whose duties correspond to those of the executor under a will, is styled an administrator; and for purposes of administration the personal assets of an estate are considered as massed together at their total appraised value, and so appropriated first to the payment of legal debts or claims against the estate in the order of preference (inclusive of statute allowances to a widow), and finally, to distribution.

The surplus, if any, which remains for this latter purpose, is computed by deducting from the appraised value of the personal assets, increased by such sums as may have accrued to the estate in the course of administration, whatever the administrator may have lawfully paid out in a just course of administration and what should be allowed him; and if the administrator's accounts are properly filed and approved in court, the distributive balance will appear on his final account.

<sup>1</sup> Attorney-General v. Johnstone, Amb. 577; 1 Jarm. Wills, ed. 1861, 724; Cowling v. Cowling, 26 Beav. 449; King v. Strong, 9 Paige, 94.

As to the payment and satisfaction of legacies, and the proper settlement of the estate of a deceased person, see Schoul. Ex'rs and Adm'rs, §§ 476-491.

§ 565. **The Same Subject; Method of Distribution.**—The method in which distribution shall be made is set forth by statutes known familiarly as statutes of distribution; the most famous of these being the English statute of 22 and 23 Charles II. In all or most of the United States there is some explicit statute of this sort in force; and though the American policy of descent and distribution may be said to differ considerably from that of England, yet with regard to personal property the English statute, which itself is largely borrowed from the civil law, serves as the basis of our own legislation.<sup>1</sup>

<sup>1</sup> See 2 Bl. Com. 515; 2 Kent Com. 421, 422; 2 Wms. Ex'rs, 6th Eng. ed. 1872 *et seq.*; Schoul. Ex'rs and Adm'rs, §§ 492–508.

The following table shows the usual method of distributing intestate estates under the English and American Statutes of Distribution:—

**IF INTESTATE LEAVES**

Widow and children, or child . . . . .	Widow takes one third; the rest goes to the children or child; if dead, to their representatives, or lineal descendants.
Widow . . . . .	Half to widow, the rest to next of kin of the intestate, in equal proportions, or to their representatives; if no next of kin, to the State. But in some States, the balance of personal estate being small, widow takes the whole, in default of issue surviving.
Children or child . . . . .	Children take equally, whether male or female; or all to only child.
Children by more than one wife . . . . .	Children take equally.
Child and grandchild by deceased child . . . .	Half to child, half to grandchild.
Grandchildren . . . . .	<i>Per capita</i> .
No widow or descendant . . . . .	Father, if living, takes all.
No widow, descendant, or father . . . . .	To mother, brothers, and sisters in equal shares, and to any children of deceased brother or sister by right of representation. Representation not allowed here to the extent of grandchildren under most statutes. Mother often takes by local statute in preference to brother or sister.
No widow, descendant, father, brother, or sister, &c. . . . .	Mother takes all.
No widow, descendant, father, mother, brother, or sister . . . . .	Next of kin in equal degree; preference being given, where there are two or more collateral kindred in equal degree, but claiming through different ancestors, to those who claim through the nearest ancestor.
Intestate being a married woman, and leaving a husband . . . . .	Husband entitled to all personal estate; but recent statutes in some States, give half to intestate's child, or children, if any survive.
In case of no known widow, husband, or next of kin . . . . .	Balance goes to the State.

But as statute provisions vary in different States, the local statute

should always be carefully consulted by an administrator in settling dis-

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tributive shares. Legislation in this country favors placing the descent of real, and the distribution of personal estate, in case of intestacy, on more nearly the same footing than the English law allows. This subject of distribution is more fully considered in Schoul. Ex'rs and Adm'rs, §§ 492-508.

Upon the general subject of Legacies, the reader is referred to the extensive works of Jarman and Red-

field on Wills. Roper on Legacies discusses many of the technical distinctions which have arisen under this head. As to distributive shares, the payment of legacies, and the administration of the estates, testate or intestate, of deceased persons generally, see Schouler Executors and Administrators. In Williams Executors, latest American edition, the whole subject may likewise be profitably studied.

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